APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 65)

PERSONAL INFORMATION

1. Full Name: **Andrew Martin Jacobs**

2. Have you ever used or been known by any other name? **No.** If so, state name:

3. Office Address: **Arizona Court of Appeals, 1501 West Washington, Phoenix, Arizona 85007**

4. How long have you lived in Arizona? What is your home zip code?

   I have lived in Arizona for 22 years and ten-plus months (since December 2001). My home zip code is 85003.

5. Identify the county you reside in and the years of your residency.

   I reside in Maricopa County, and have from November 2016 through the day of this application in October 2024.

6. If nominated, will you be 30 years old before taking office? **Yes.**

   If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? **Yes.**

7. List your present and any former political party registrations and approximate dates of each:

I am registered as a Democrat. I have been registered as a Democrat since 2002 in Arizona. While I do not have a record of my exact date of registration, I was registered as a Democrat when I lived in Illinois during the years 1986 through 2001.

(The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

8. Gender: **Male**

Race/Ethnicity: **Caucasian**

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

Bradley University, Peoria, Illinois, 7/85-5/86, no degree (transferred)

University of Illinois, Urbana-Champaign, Illinois, 8/86-5/89, Bachelor of Arts

Harvard Law School, Cambridge, Massachusetts, 9/89-6/92, Juris Doctor

10. List major and minor fields of study and extracurricular activities.

Fields of Study

- **I majored in History, completing concentrations in American History, Ancient History, European History, and Russian History as part of my major. My minor was in Psychology.**
- **My law study focused on constitutional and business issues in substantial part.**

Extracurricular Activities

- **Faculty, Bradley University Forensics Institute (a summer speech camp program for high school students) (1985)**
- **Bradley University Forensics Team (1985-86) (competed for University's speech team in Extemporaneous and Impromptu Speaking during regular season tournaments and two national tournaments; was part of national championship team at both tournaments)**
- **Part-Time Speech Coach, Downers Grove South H.S. (1985-86)**
- **Prepared Senate Candidate Judy Koehler for U.S. Senate Debate (1986)**
- **Illini Speech Team (1987-88) (competed for University's speech team in Extemporaneous Speaking and Impromptu Speaking during regular season, winning national championship individually in Extemporaneous Speaking)**
- **Faculty Coach, University of Iowa Summer Forensics Institute (a summer program coaching high school students in competitive speech and debate) (1988)**
- **Part-Time Speech Coach, Downers Grove South H.S. (1988-89)**
- **Founder and Editor-in-Chief, *Illini Journal*, a monthly campus newspaper (1989)**
- **Participant, Ames Moot Court Competition (1990)**

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

Bradley University (1985-86)

Scholarships. I attended Bradley University in part on merit-based scholarships, as I was recruited by Bradley before enrolling there to participate in the school's forensics (*e.g.*, competitive speech) team. I do not recall the name of the scholarships I received, but believe one was funded in part by and named for Bradley's basketball coach, Dick Versace.

Awards. **As a college freshman, I placed second at the 1986 National Speech Tournament held by the American Forensic Association in Impromptu Speaking and was a national semifinalist (finishing in the top 12) at the 1986 National Speech Tournament held by the National Forensic Association in Impromptu Speaking. My commitment to speech required me to miss extensive amounts of class for travel to competitions, amounting to more than three weeks of the 1985-86 academic year and an entire week in April 1986, which made academic performance more difficult.**

Employment. **During the summer of 1985, while enrolled in summer session at Bradley University, I worked as a faculty member at the Bradley University Forensics Institute, a summer camp teaching competitive public speaking skills to high school students.**

Additionally, to help fund my education, I worked throughout the 1985-86 school year as a part-time speech coach for my alma mater, Downers Grove South High School, in Downers Grove, Illinois. This involved traveling between Champaign and Downers Grove on many weekends, and meeting up with the Downers Grove South High School speech team at competitions.

The University of Illinois, Urbana-Champaign (1986-89)

Scholarships. **In May 1989, I was awarded two scholarships by the Department of History, one for having the highest grades in History, the other for the Outstanding Thesis in History, which was a study of the Second Vatican Council and doctrinal and other conflict in the Roman Catholic Church over it, as theologians contested its proper interpretation.**

Awards. **In 1988, I was the American Forensic Association College National Champion in Extemporaneous Speaking, a forensic event requiring the preparation in 30 minutes of analytic seven-minute speeches answering questions about current events topics. In the 1987-88 season, I competed in five regular season tournaments in Extemporaneous Speaking, winning four and placing third in one. I did not compete in forensics in my sophomore or senior years of college.**

The history scholarships noted two paragraphs above were given as the Martha Belle Barrett Prize for outstanding thesis in history, which was also jointly awarded to another classmate for her thesis.

Employment. **I was again a part-time speech coach at Downers Grove South High School during my senior year of college (1988-89). I also worked as a judge at speech and debate tournaments.**

Harvard Law School (1989-92)

Awards. **I graduated law school *magna cum laude*. My grade point average was 6.26, with 6 being A- and 5.8 being the threshold for *magna cum laude*; 72 students in my class of approximately 550 (approximately 14%) graduated *magna cum laude*. I received a grade of A+ in two courses with very large enrollments (over 100 students), Advanced Constitutional Law, and Race, Racism and American Law. These grades were either alone the highest grades in each course, or tied for that distinction.**

Employment. **I worked during my second and third years of law school as a research assistant for Professors Laurence Tribe and Alan Dershowitz. The work was all appellate in nature. This included assisting in research and analysis of a circuit split to inform a petition for certiorari in a case that was intended to cause the U.S. Supreme Court to review the standard for the admissibility of expert testimony.**

During my third year of law school, I was also employed by Harvard College as a Teaching Fellow, leading a weekly section in the class "What Is Law?," taught by Professor Peter Berkowitz. Additionally, I judged speech and debate tournaments that year to help make ends meet.

During the summers of 1990 and 1991, I was employed as a summer associate in the litigation departments of the law firms Jenner & Block (1990 and 1991) and Sidley & Austin (1991 only). I received offers of associate employment from both and accepted Jenner's offer.

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for any administrative bodies that require special admission to practice.

Supreme Court of Illinois (November 5, 1992)

United States District Court, Northern District of Illinois (February 2, 1993)

United States Court of Appeals, Seventh Circuit (February 23, 1994)

United States District Court, Eastern District of Michigan (July 31, 2001)

Supreme Court of Arizona (October 29, 2001)

United States District Court, District of Arizona (February 11, 2002)

United States Court of Appeals, Ninth Circuit (September 2, 2005)

United States Court of Appeals, Federal Circuit (April 9, 2007)

United States Supreme Court (February 21, 2012)

Supreme Court of Nevada (December 21, 2012)

United States District Court, District of Nevada (April 26, 2013)

United States Court of Appeals, Tenth Circuit (March 30, 2015)

United States District Court, Eastern District of Arkansas (June 8, 2016)

Pro Hac Vice Admissions

I have not kept records throughout my career of each pro hac vice admission, but upon diligent investigation have reconstructed the following pro hac vice admissions, and believe they comprise the majority if not all of my pro hac vice admissions:

I was admitted to practice before the state trial court in Kalamazoo, Michigan in a case at Jenner & Block at some time before September 1997. I estimate that admission continued into 1999, but I believe I only appeared once before the Court in person, on September 5, 1997.

I was admitted to practice pro hac vice before the state trial court in Anchorage, Alaska on March 30, 2006 and continued in practice thereafter until 2011.

I was admitted pro hac vice to practice before the United States District Court for the Northern District of California on October 8, 2008.

I was admitted pro hac vice in the state trial court in Clark County, Nevada (Las Vegas) on August 27, 2010.

I was admitted pro hac vice to practice before the Nevada Supreme Court on September 27, 2011.

I was admitted pro hac vice to practice before the New Mexico Court of Appeals in Albuquerque, New Mexico on or about April 1, 2014, and at least once thereafter.

I was admitted pro hac vice by the Colorado Court of Appeals on August 7, 2018.

I was admitted pro hac vice to practice before the Utah Court of Appeals on March 21, 2019.

I was admitted pro hac vice to practice before the Washington Court of Appeals on February 26, 2021.

I was admitted pro hac vice to practice before the Los Angeles County, California Superior Court on October 1, 2020, and was admitted to practice pro hac vice before the California Court of Appeals on June 23, 2022.

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No.** If so, explain.

b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No.** If so, explain any circumstances that may have hindered your performance.

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
Arizona Court of Appeals	**Mar. 2023-present**	**Phoenix, AZ**
Snell & Wilmer, LLP, Partner	**Nov. 2016-Mar. 2023**	**Phoenix, AZ**
Arizona State University Sandra Day O'Connor College of Law, Adjunct Professor, "Professional Responsibility"	**Aug. 2017-Dec. 2017**	**Phoenix, AZ**
Snell & Wilmer, LLP, Partner	**Jan. 2004-Nov. 2016**	**Tucson, AZ**

The University of Arizona James E. Rogers College of Law, Adjunct Professor, "Legal Writing," and "Civil Rights Litigation"	**Jan. 2006-Dec. 2006**	**Tucson, AZ**
Snell & Wilmer, LLP, Associate	**Jan. 2002-Dec. 2003**	**Tucson, AZ**
Jenner & Block, LLP, Partner	**Jan. 2000-Dec. 2001**	**Chicago, IL**
Jenner & Block, LLP, Associate	**Sep. 1992-Dec. 1999**	**Chicago, IL**
Harvard College, Teaching Fellow, Undergraduate Course, "What Is Law?"	**Sep. 1991-Dec. 1991**	**Cambridge, MA**
Jenner & Block, LLP, Summer Associate	**Aug. 1991**	**Chicago, IL**
Sidley & Austin, LLP, Summer Associate	**May 1991-Aug. 1991**	**Chicago, IL**
Harvard Law School, Research Assistant, Profs. Laurence Tribe, Alan Dershowitz	**Sep. 1990-Apr. 1992**	**Cambridge, MA**
Jenner & Block, LLP, Summer Associate	**June 1990-Aug. 1990**	**Chicago, IL**

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

<u>See</u> Attachment A, List of Attorneys (Partners, Of Counsel, Counsel, Associates, Senior Attorneys [formerly designated as Staff Attorneys]), Snell & Wilmer, LLP, November 1, 2019 through March 10, 2023; Attachment B, List of Judges of the Arizona Court of Appeals from March 27, 2023 through October 31, 2024.

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

I was engaged in law practice for two-thirds of the last 5 years (from November 2019 through March 10, 2023). During that period, I was principally engaged as a civil appellate lawyer, and estimate that was 80% of my practice. Those civil appellate matters concerned a wide variety of subjects, including contract law, commercial law, federal constitutional law (First Amendment, due process, takings), tax law, intellectual property law, and the law of sanctions.

I estimate that I spent 10% of that time engaged in practice in cases in trial courts. Those matters were largely commercial and tax law, with some federal constitutional law (Takings Clause, Due Process Clause, First Amendment), and some contract law.

I estimate that the remaining 10% of my time was spent in professional liability and professional responsibility matters.

17. List other areas of law in which you have practiced.

I practiced in a wide variety of areas of law during my time in practice.

Using as a template the SuperLawyers list of areas of practice, I have practiced in: administrative law, antitrust, appellate, aviation or aerospace disputes, banking law (litigation and nonlitigation), bankruptcy, business litigation, corporate (litigation and counseling), civil rights (litigation), class action (defense), closely held businesses (litigation and counseling), communications (telecommunications litigation and counseling), constitutional law, construction litigation, consumer law (defense), creditor debtor rights (litigation and counseling), criminal defense (limitedly, in pro bono briefing in 1994 at my prior firm on a large case team), criminal defense – white collar, e-discovery (counseling), elder law (litigation in probate court of elder law issues), eminent domain litigation, employee benefits litigation (under the ERISA statute), employment litigation (defense), energy and natural resources litigation, estate and trust litigation, family law (litigation), food and drugs (litigation and federal regulatory compliance), franchise (litigation), gaming litigation, general litigation, government contracts litigation, health care litigation, immigration-related litigation, insurance coverage (litigation and counseling), intellectual property litigation, international litigation (including issues in Mexican law), land use and zoning (litigation and counseling), pro bono litigation, media litigation, mergers and acquisitions litigation, military/veterans law (litigation), Native American law (litigation), personal injury – products (defense), professional liability (litigation and counseling), real estate (litigation), securities litigation, surety (litigation), tax

(litigation), technology transactions (litigation), utilities (litigation and administrative proceedings), and workers' compensation (litigation).

Not otherwise listed or clearly encompassed above in my responses to parts 16. and 17., I have also worked on matters in the areas of arbitration law, civil RICO, homeowners' association law, housing discrimination, indemnification, Internet-related litigation, medical practice disputes, noncompete litigation, software litigation, trademark litigation, and utility litigation – nuclear waste.

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state.

None.

19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

A. <u>Drafting Rules</u>

One of the ways I have sought to perform public service, and to improve the practice of law, is through my work on court rules. This has been a major commitment, consuming well more than a billable year of my professional time since 2009, and a real pleasure. My experience in drafting rules came in part from my time serving in four Arizona Supreme Court-appointed groups of judges and lawyers, the Task Force on the Arizona Rules of Civil Procedure (2014-2016), the Committee on Civil Justice Reform (2015-2017), the Commission on Jury Data Collection, Practices, and Procedures, and its subgroup, the Statewide Jury Selection Workgroup (2021-22), and the Task Force on the Rules of Procedure for Special Action (2023-24). It also came from my fifteen years as a member of the State Bar of Arizona Civil Practice and Procedure Committee (2009-present), my four one-year terms as the Chair of that Committee (2014-2018), and my work in the Innovation Subcommittee within the Maricopa County Superior Court's Civil Department Task Force (2020).

As set forth in more detail below, the court rules to which I have contributed editorially include Arizona Rules of Civil Procedure 5, 5.1, 5.2, 6, 7, 7.1-7.4, 8, 8.1, 9, 11, 16, 26, 26.1, 26.2, 37, 47, 45.2, 54, 58, Arizona Rule of Civil Appellate Procedure 7, Justice Court Rules 123, 124, 125, and 126, Supreme Court Rule 28, Arizona Rules of Procedure for Special Action 1-20, and a pair of rules that became effective as emergency measures during the pandemic: Maricopa County Superior Court Administrative Order 2020-72, In the Matter of Late Case Fair Limits Proceedings, and Maricopa County Superior Court Administrative Order 2020-71, In The Matter of Establishing a Certified Arbitrator Program.

1. Within the Task Force on the Arizona Rules of Civil Procedure

While working in the Task Force on the Arizona Rules of Civil Procedure (the "Task Force"), I was given the opportunity to be the coordinator of Working Group One, which had responsibility to restyle Arizona Rules of Civil Procedure 1 through 20, other than Rules 11 and 16. Our working group, which included Judge D. Douglas Metcalf, restyled those rules, making them more comprehensible for users, consistent with the Task Force's mission. The Supreme Court adopted our proposed restylings of Rules 1-10, 12-15, and 17-20, and several substantial changes within those rules, effective January 1, 2017. The most substantial changes that our Working Group proposed that became part of the rules were:

a. Reorganizing and Modernizing the Filing of Pleadings: Rules 5-5.2

We reorganized the rules governing the filing of pleadings. Previously, Rule 10(d), Forms of Documents, governed the form of papers to be filed with the Superior Court, even though Rule 10 only purported to govern pleadings, and even though Rule 5 otherwise controlled mechanical aspects of filing documents with the Superior Court. Rule 5.2 (the new site of the relocated former Rule 10(d)) was revised to create the font-sizing compatible with then-recent changes to the Arizona Rules of Civil Appellate Procedure (ARCAP), and which worked with changes to page limits in Rule 7.1 (described below) to avoid changing the length of the standard Arizona brief. We also revised new Rule 5.2, consistent with the recent revisions to the ARCAP, to encourage the use of serif fonts.

Within reorganized Rules 5-5.3, we suggested several more substantial changes. New Rule 5.2(c) created detailed requirements for electronically filed documents, as to their format (.pdf, .odt, or .docx), with text-searchability preferred. It also suggested bookmarking and hyperlinking, without requiring them, as we sought to modernize the rules while providing a platform for graceful future change.

b. Clarifying the Calculation of Due Dates: Rules 6(a), 6(d)

I suggested and we drafted new Rule 6(d), Minute Entries, Orders, and Other Court-Generated Documents, to resolve confusion arising because the only treatment in the Arizona Rules of Civil Procedure of when acts are due to be undertaken in response to orders was housed in Rule 58(e). We thought that subject should be addressed in Rule 6, Computing and Extending Time, with an explanation addressed not only to judgments, but to all minute entries, orders, and other court-issued documents.

Separately, we also adopted the federal practice of "counting backwards" when a rule or order required something be done a number of days before trial or

some other event. Thus, under our revised Rule 6(a)(3) and (4), if the last day of a period counted back to determine when something must be done falls on a weekend or legal holiday, the act must be done on the first court day before (and not after) that day. By making this change, we aligned our rules with the federal rules, avoiding the confusion arising from having two complex but opposite rules on the same subject.

c. <u>Reorganizing and Clarifying Pleading Practice: Rules 7.1(h), 7.3, and 7.4</u>

To make litigation more uniform among Arizona's counties and also within Arizona's state and federal courts, we drafted a revised Rule 7.1 to create length limits of 17 pages for motions and responses, and 11 pages for reply. This made practice uniform among the counties, among which only Maricopa and Pima had 15-page limits, and made state practice consistent with federal practice under the Local Civil Rules for the District of Arizona. For readability and to avoid altering the length limit, our revised Rule 7.1 moved the limit prevailing in Arizona's two most populous counties from 15 to 17 while changing the minimum font size from 12 point to 13 point.

We proposed reorganizing the rules concerning motions, as by curing the misplacement of the procedures for Orders to Show Cause in Rule 6, Computing and Extending Time, by suggesting establishing a Rule 7.3 named Orders To Show Cause. Within that rule, to protect substantive rights of litigants not protected in the prior Rule 6(d), we proposed at my suggestion that new Rule 7.3 require the court to permit a response by the party against whom show-cause relief is sought, so the court would have to hear from both sides before issuing final relief.

We helped promote meeting and conferring, which is one of the signal attributes of Arizona's civil practice culture, by creating in new Rule 7.1(h) a uniform certification of good faith consultation requiring at least a phone call about an issue (and not merely an exchange of e-mails) before litigants could file certain motions. That form of certification is required to be used in Rules 5.4, 11(c), 26(g), 37(a), and 56(d) before filing motions for sanctions, to compel, for protective order, or for additional time to take discovery before responding to a motion for summary judgment.

Finally, we drafted new Rule 7.4, which governs the preparation of joint filings, such as joint reports, proposed scheduling orders, and pretrial orders. It encourages courts to sanction nonparticipating parties where appropriate and gives parties left doing both sides' work a rule to point to, to obtain relief.

d. <u>Eliminating Requirement of Verifications: Rule 9(i)</u>

Consistent with modern trends toward making rules more useful, intuitive, and comprehensible to infrequent users of them, we proposed the elimination of

Rule 9(i), which required that answers be verified if they asserted certain affirmative defenses. This requirement no longer served any purpose other than trapping respondents who filed otherwise valid and responsive answers who were unaware of the requirement, and thus subject to a motion to summarily resolve their defenses against them.

2. Within the Committee on Civil Justice Reform ("CCJR")

I had the privilege of serving as the coordinator of the CCJR's Working Group Two, which included Justice Robert Brutinel, Judge Patricia Trebesch, Judge Jeffrey Bergin, and attorney Veronika Fabian. Our group was charged with proposing potential case management reforms. The rule reforms described below in this Section A.2. were adopted by the Arizona Supreme Court in September 2017 with modification to some of their proposed language, and became part of the Arizona Rules of Civil Procedure on July 1, 2018.

a. Case Management Reforms: Rules 26.2, 8, and 16

In my role as coordinator, I was the principal drafter of Arizona Rule of Civil Procedure 26.2, a rule establishing a system of tiered limits to discovery. Tiering is meant to promote proportionality in litigation by greatly reducing the amount of discovery permitted as of right in cases with smaller amounts in controversy. New Rule 26.2 also works hand-in-glove with changes to Rules 8 and 16 of which I was also the principal drafter. These additional changes require the parties to meet very early in a case to discuss the tier to which their case should belong, to promote the earliest and most efficient planning for disclosure and discovery in cases. These case management reforms, based upon work in other jurisdictions like Utah and studies by national groups such as the Conference of Chief Justices and the Institute for the Advancement of the American Legal System, are aimed toward making discovery narrower and less expensive, while also helping cases resolve more quickly. I was also the principal drafter of the Comment to Rule 26.2.

b. Discovery Reform: Rules 26(d), 37(c), and 37(h)

Within the CCJR, I was likewise tasked with drafting new Arizona Rule of Civil Procedure 26(d), on which I worked closely with Judge Patricia Trebesch. New Rule 26(d) largely abolished motions to compel and for protective orders in the resolution of discovery and disclosure disputes, while nonetheless providing litigants with more protections against arbitrariness or imprecision in their resolution than prevails in the similar federal practice. Rule 26(d) improves upon similar practice in Arizona federal courts and is more fair because it: requires the parties to briefly frame the dispute in writing for the benefit of the court and the parties; requires the Superior Court to issue a written decision on the framed question; and permits the parties to file additional materials to make them of record, which is notably not permitted as of right in federal practice.

Within the CCJR, I was likewise the principal drafter of several reforms to Rule 37 that significantly altered discovery and disclosure practice in Arizona courts. I drafted Arizona Rule of Civil Procedure 37(h), modeled on Utah's Rule 37(g), which allows the trial court to shift disclosure and discovery expenses among parties to make expenses proportional.

I also drafted the language in what is now Arizona Rule of Civil Procedure 37(c), which substantially repealed an Arizona Supreme Court decision (*Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284 (1995)) that discouraged the Superior Court from imposing sanctions on parties that failed to comply with disclosure requirements. Rule 37(c) now provides that evidence that was belatedly disclosed or improperly withheld from disclosure may only be used at trial upon a showing that the failure to disclose was harmless. This is the opposite of the presumption under *O'Toole*, which provided that such evidence would come in unless the party disadvantaged by it could prove harm. That presumption, judges told us, almost assured them that they would be reversed if they sanctioned a party for late disclosure, which in turn had made Arizona's disclosure rules work for withholders and not for the compliant.

Finally, I was also the principal drafter of the Comment to Rule 37. The Comment emphasizes to the trial court that the Supreme Court expects the new powers in Rule 37 to be exercised by trial judges to promote proportionality and to discourage abuses in discovery and disclosure.

c. <u>Pleading and Discovery Reform: Rules 8(b) and 36(a)</u>

Within the CCJR, I was the principal drafter of changes to Rules 8 and 36 to stop lawyers from hiding behind meaningless language like "the document speaks for itself," a practice that has long slowed cases and overburdened litigants. Under new Rule 8(c), responses in answers stating that "the document speaks for itself" or that a party "denies any allegations inconsistent with the language of a document" are deemed not to be fair responses to the substance of allegations. This in turn means the allegations can then be deemed admitted, which in turn will encourage parties to fairly meet the substance of allegations in answers.

Under new Rule 36(a)(5), answers to requests for admission likewise do not fairly respond to requests where they use the above-quoted language. If parties use these evasive responses, the court can now treat their response as an admission. This forces parties to actually answer allegations and requests. This in turn helps make litigation faster, cheaper, and better.

d. <u>Third-Party Discovery Reform: Rule 45.2</u>

I proposed in the CCJR's May 2016 meeting that we create what became Arizona Rule of Civil Procedure 45.2 (which my colleague Jodi Feuerhelm drafted

and refined, as it fell within her group's area of primary responsibility), a first-in-the-nation innovation that discourages improper requests to preserve documents by making proponents of document retention requests responsible for the costs and fees flowing from unjustified requests of this type. This rule should be of particular aid to large businesses, which are most commonly the objects of casual, ill-considered, and legally insupportable demands that they preserve large swaths of information.

3. <u>Within the Civil Practice and Procedure Committee (the "CPPC") of the State Bar</u>

a. <u>Making Lobbying the Supreme Court for Rule Changes Transparent: Supreme Court Rule 28</u>

While serving as Chair of CPPC, I established a subcommittee to comment on proposed revisions to Supreme Court Rule 28, the rulemaking rule. I took the unusual step of leading this subcommittee and personally drafting a proposed revision of Rule 28 as part of commenting on the Supreme Court Staff Attorneys' petition to revise that rule. CPPC's draft, which was mostly adopted as proposed by the Arizona Supreme Court effective January 1, 2019, makes lobbying of the Supreme Court for rule changes transparent to all. It does so by requiring that transmittals to the Arizona Supreme Court concerning proposed changes to rules will be posted on the Court's Rules Forum for public knowledge and viewing. It further provides that verbal comments to members of the Court are likewise subject to public disclosure on the rules forum, in service of transparency and accountability.

b. <u>Fixing an Unintended Incentive for Litigating Infirm Claims: Arizona Rule of Civil Appellate Procedure 7</u>

As Chair of the CPPC, I established a subcommittee to propose reforms of ARCAP 7. ARCAP 7 had been amended after the Legislature's January 1, 2012 amendment to A.R.S. § 12-2108, which was intended to protect businesses from the difficulty in posting appeal bonds in cases with large monetary judgments. However, the revised statute was not clear on the question of whether a judgment for something other than "damages" required bonding at all. This led to the problem exemplified by *City Center v. Jantzen*, 237 Ariz. 37 (App. 2015) – that a $2.3 million fee award accompanied by a $1 damage award could be appealed, and execution upon it stayed – by the posting of a $1 bond.

The subcommittee I established drafted a fix so that litigants who have awards of attorneys' fees against them because they lose (a set of litigants that includes many plaintiffs bringing claims that are frivolous or nearly so) would have to post a bond to stay execution of the fee judgment against them. This was consistent with the underlying legislative history. Our change was proposed by the State Bar and approved by the Arizona Supreme Court (demonstrating its

concurrence with our view that *Jantzen* was not entailed by the language of A.R.S. § 12-2108), and became effective January 1, 2019.

c. Keeping Disclosure Congruent with Discovery: Rules 26.1(b)(1), 26(b)(1)(B), and 26.1(b)(2)(E)

The Task Force on the Arizona Rules of Civil Procedure had completed a draft proposed revision to the Arizona Rules of Civil Procedure for external review by September 2015. This draft included a change to Rule 26(b)(1)(B) that would change from "may" to "must" whether the court would restrict discovery if it: (i) is unreasonably cumulative or duplicative, or can be obtained from another source that is more convenient, less burdensome, or less expensive; (ii) seeks information that the party has had ample opportunity to obtain; or (iii) is outside the scope permitted by Rule 26(b)(1)(A) (which amounted to the factors making discovery proportional). While that would have further federalized Rule 26, it would have created a contradiction between Rule 26.1's command to produce voluntarily all arguably relevant material, and a later command to prohibit discovery of relevant material – which in any event should already have been produced.

The Task Force had not yet addressed this issue. As Chair of CPPC, I suggested to the CPPC that the Task Force's draft needed to make the standards for discovery and disclosure congruent – either by declining to require the Superior Court to restrict discovery if it was not proportional, or by allowing objection to producing disclosed documents if their production offended these proportionality principles. The CPPC, and then the Task Force, agreed. This resulted in engrafting the proportionality standards onto Rule 26.1's command to disclose all relevant materials at the outset of the case. Thus, in Rule 26(b)(1), disclosure of hard copy documents is subject to the same factors limiting the scope of discovery. Rules 26.1(c)(1) and 26(b)(1)(B) accomplish the same thing with respect to ESI discovery. The bottom line is that this was an important change because it helped keep disclosure and discovery proportional.

d. Restyling the Arizona Rules of Civil Appellate Procedure

I served as a member of the CPPC's subcommittee supporting the 2013 restyling of the Arizona Rules of Civil Appellate Procedure (the "ARCAP"). Our subcommittee divided work on the rules into discrete sections. I worked with and supported the late Judge Kenton Jones on proposals to restyle Rules 27-37 of the ARCAP. The restyling of these rules flowed in substantial part from Judge Jones' work, as to which I played a supporting part through meeting with him and working on the draft restyled versions of those rules.

e. Revisions to Rule 54(g) and (h)

I served as part of two different CPPC subcommittees whose work to revise Rules 54(c), 54(g), and 54(h). Some of my contributions are part of Rule 54(g) and

(h), though that project was so protracted and had enough authors that it was a truly collective effort. My involvement was to help specify the different conditions that could trigger a requirement to seek fees in a Rule 54(b) judgment, so no one would mistakenly defer seeking fees only to learn that they had no such entitlement.

f. Drafting Rule 7.1(g)

In my first assigned project as a member of CPPC, I drafted Arizona Rule of Civil Procedure 7.1(g), which allows the parties to freely shift briefing schedules for efficiency and to avoid troubling the court with excessive stipulations and orders, so long as the requested changes do not violate court-imposed schedules or the requirements of other court rules. In that process, I met and consulted with the civil bench in Pima County, and those consultations materially altered and improved the operation of the draft rule.

g. Revising Rule 11

Rule 11 has undergone many revisions in recent years, and I participated editorially in them in CPPC, the Task Force, and the CCJR. The one contribution in Rule 11 that is specifically mine is the requirement in Rule 11(c)(2)(B) of a written notice to a party alleged to have violated Rule 11 specifying the conduct that violated Rule 11, which I suggested in a CPPC discussion in late spring 2014.

This provision has two intended benefits. First, CPPC had been struggling with how to keep Rule 11 cheaper and easier to use than Federal Rule of Civil Procedure 11, which has all the nimbleness of a battleship. The federal rule requires a filer to prepare their Rule 11 motion and serve it 21 days before filing to give the other party highly specific notice and an opportunity to cure their conduct. That was too much burden for state litigation and would unduly chill use of Rule 11, so the requirement of a mere written notice stating grounds reduced that long motion to a short e-mail. Second, by requiring a Rule 11 movant to craft a writing, the motion would still necessarily be limited to those subjects about which prior notice was given, thus avoiding the possibility of Rule 11 motions brought without the rigor of prior notice and an opportunity to cure, which would unduly foster use of Rule 11.

4. Additional Work to Reform or Create Court Rules Outside of the Civil Practice and Procedure Committee

a. Commenting to Mesh Rule 8.1 With Rule 26.2

In June 2018, the Commercial Court Review Committee constituted by the Arizona Supreme Court filed Petition No. R-18-0033, requesting modifications to and adoption of Experimental Arizona Rule of Civil Procedure 8.1. I noted that the Committee's proposed revised Rule 8.1 would effect a change that did not take

account of new Rule 26.2, the tiering rule. If left in place, the proposed language would have suggested incorrectly to readers of Rule 8.1 that there was a contradiction between Rule 8.1 as now revised and Rule 26.2. I commented on the Court Rules Forum and proposed striking certain language so that revised Rule 8.1 would correctly dovetail with Rule 26.2. The Committee agreed and the Supreme Court's adoption of Rule 8.1 as a permanent rule of civil procedure reflects the change I suggested through the Court Rules Forum.

b. <u>Petitioning to Modify Justice Court Rules 123, 124, 125, and 126</u>

In January 2019, I petitioned with Judge Sara Agne and attorney Amanda Weaver of Snell & Wilmer to modify the Justice Court Rules of Civil Procedure to make discovery in sub-$10,000 cases proportional. *See* Petition No. R-19-0020. In 2017, the Arizona Supreme Court revised the Arizona Rules of Civil Procedure (through the above-described work of the Task Force on the Arizona Rules of Civil Procedure) to enshrine proportionality as the guiding principle of discovery. Proportionality means in part not spending too much on civil discovery when the amount at issue is low. For that reason, new Rule 26.2 (the drafting of which is described above on pages 12-13) established a system of tiered discovery, permitting less discovery in most cases in which the amount in controversy is $50,000 or less. Despite that reform, the Justice Court Rules of Civil Procedure, which had not been substantially amended since the major revisions to the Arizona Rules of Civil Procedure in 2017 and 2018, retained the same higher limits on discovery that applied to all cases in the Arizona Rules of Civil Procedure prior to July 2018, even though Justice Court cases are those with $10,000 or less in controversy. This created the anomaly that Tier 1 cases in the Superior Court concerning $50,000 or less had limits of five hours of fact witness deposition time, five interrogatories, five requests for production, and ten requests for admission, while Justice Court cases (which concern $10,000 or less) had no limit on fact witness deposition time, and far more generous limits of forty interrogatories, ten requests for production, and twenty-five requests for admission. Our Petition asked the Court to substitute in Justice Court Rules of Civil Procedure 123-126 the limits for Tier 1 cases found in Arizona Rule of Civil Procedure 26.2(f)(1), so cases under $10,000 have the same discovery limits as cases from $10,001 to $50,000, both for proportionality's sake, and to avoid perverse incentives for lawyers to litigate in Justice Court instead of Superior Court. The Arizona Supreme Court adopted our petition's proposal, effective January 1, 2020.

c. <u>Work Within the Maricopa County Task Force on Response to the Pandemic to Create Fair Limits Proceedings and to Enhance Arbitration</u>

In April 2020, I was asked to serve on a ten-person Innovation Subcommittee within the Maricopa County Superior Court's Civil Department Task Force, aimed at keeping the courts working and moving during the pandemic. Taking advantage

of Judge Gates' suggestion that we innovate, I proposed a novel procedural rule that did not then exist in any jurisdiction called the Fair Limits Proceeding. Under this proposal, as a case neared trial, the parties could wait until a jury trial was feasible, or could work with a judicial Fair Limits Officer to work toward settlement, or toward a resolution through more streamlined means. These might include limited live testimony, written openings and/or closings, trials on more limited issues, or hearings to resolve critical questions, either leading to narrower trials, mediations, or settlements. The rule also encouraged the parties to work with the Fair Limits Officer to devise innovations to narrow their dispute, to make its advancement practical. No party was required to agree to any narrowing of their case, but the goal was to resolve or advance cases at a time when in-court jury trials were not then available. I wrote up a detailed proposal and draft order, which the Maricopa County Superior Court adopted with light revisions as Administrative Order 2020-72, In The Matter of Late Case Fair Limits Proceedings. The procedure was initially very popular and widely utilized, and then fell out of use after the pandemic eased, allowing the resumption of in-court jury trials.

Separately within the same group, attorney Lance Broberg proposed and crafted a draft order for a Certified Arbitrator program. Lance was principally responsible for that program and its draft. Supporting Lance's excellent work, I contributed a number of revisions to his proposal that likewise became part of Maricopa County Superior Court Administrative Order 2020-71, In The Matter of Establishing a Certified Arbitrator Program.

d. <u>Commenting Against the Proposal of the Committee of Presiding Judges to Abrogate the Right to Change of Judge</u>

On January 13, 2021, the Committee of Presiding Judges filed Petition No. R-21-0006, asking the Arizona Supreme Court to abrogate the rules permitting a change of judge as of right. The Supreme Court had suspended change of judge as an emergency measure in the pandemic, and many thought the result a greatly preferable policy. On April 20, 2021, Judge Greg Sakall, myself, Judge Richard Gordon, and Judge Kenneth Lee (all three were Judges of the Pima County Superior Court) filed a nineteen-page comment arguing that whatever the merits of the policy debate over change of judge, the right was guaranteed by statute in A.R.S. § 12-409 and was substantive. Accordingly, we argued, the Supreme Court may repeal its rules governing change of judge, but cannot abrogate the substantive right the statute guarantees. In its Rules Agenda in August 2021, the Supreme Court denied Petition No. R-21-0006, in effect sustaining the objections raised in our comment.

e. <u>Work on the Reform of Peremptory Challenges Within the State Bar's *Batson* Working Group and the Supreme Court's Commission on Jury Data Collection, Practices, and Procedures</u>

In its February 2020 meeting, the Civil Practice and Procedure Committee considered what position the State Bar might take with respect to a Petition by attorney Kevin Heade moving the Arizona Supreme Court to adopt Washington State General Rule 37, limiting peremptory strikes. In reaction to Kevin's Petition, I proposed that the State Bar establish a working group to consider proposals for the reform of practices concerning peremptory strikes. I then served in that State Bar working group, and contributed editorially to its Petition R-21-0008, filed on January 8, 2021, which proposed a Supreme Court Rule 24, and the reply in support of that Petition. The Petition's draft Rule would have continued the use of peremptory challenges in jury trials, but would have limited their operation to deter exclusion of persons based on their race, sex, and other statuses, consistent with Code of Judicial Conduct 2.3(B) and (C), which bars counsel and the court from manifesting status-based bias.

I was equally disposed to favor the outright elimination of peremptory challenges. I consulted with Judge Peter Swann about his draft Petition, filed soon thereafter with Judge Paul McMurdie, proposing the elimination of peremptory challenges. I suggested using argument headings, and the content for the particular argument headings A., B., and C. that the Judges adopted in their filed version. The Judges filed this Petition on January 11, 2011 as Petition R-21-0020.

In March 2021, the Supreme Court appointed me to the Commission on Jury Data Collection, Practices, and Procedures. Within this group, I advocated for the abolition of peremptory challenges. I also sought to focus the debate on data, because the Supreme Court's Administrative Order asked the Commission to "explore and make recommendations regarding . . . [w]hether peremptory challenges of jurors systematically reduce the representation of minorities and whether changes to the peremptory challenge rules should be made." Ariz. S. Ct. Admin. Order 2021-35. After dialogue with that Court's leaders, the Maricopa County Superior Court in May 2021 released data concerning the specific uses of peremptory challenges in that court in 2019. The Commission thereafter voted 12-4 to recommend that the Arizona Supreme Court consider abolishing peremptory challenges.

At its August 2021 Rules Agenda, before the Commission's report was to convey that recommendation, the Arizona Supreme Court made Arizona the first state in America to abolish peremptory challenges. The Commission then formed a subgroup, the Statewide Jury Selection Workgroup, to quickly propose further iterations of the rules concerning peremptory challenges. I worked in that subgroup. On November 23, 2021, the Statewide Jury Selection Workgroup filed Petition No. R-21-0045, To Amend Rules of Criminal Procedure 16.3, 18.3, 18.4 &

18.5; Rules of Civil Procedure 16 & 47; Justice Court Rule of Civil Procedure 134; and Rule of Procedure for Eviction Actions 12. I contributed to the drafting of at least the Rules of Civil Procedure and particularly the Comments to them as Petition No. R-21-0045 proposed to modify them. These modifications to the existing Rules of Civil Procedure were adopted on an emergency basis effective January 1, 2022. On August 23, 2022, the Supreme Court adopted these changes, with modifications not previously made public, on a permanent basis, effective immediately.

f. <u>The Task Force on the Rules of Procedure for Special Actions</u>

Shortly after being appointed to the Arizona Court of Appeals, I spoke with Judge Sam Thumma and then Chief Justice Robert Brutinel about the possibility of restyling the Rules of Procedure for Special Actions. Both agreed the project needed to be done. Chief Justice Brutinel determined to appoint a Task Force to this end. I was appointed to the Task Force, chaired by Justice Kathryn King. After the Task Force completed its work, the Arizona Supreme Court adopted its proposals with almost no modifications. Those proposals do not amend but instead entirely replace the prior Rules of Procedure for Special Actions that have existed almost unmodified since January 1, 1970. They become the new Rules of Procedure for Special Actions, effective January 1, 2025. My principal inputs as drafter were these:

Before the Task Force convened, I created and provided an initial draft of potential revisions to the entire set of rules that was provided to the Task Force and discussed at its first meeting. My proposal that the rules formally and clearly distinguish between special actions that begin a litigation and special actions that review a court order was adopted in Rule 2, Special Actions Defined, and in the structure of the new rules. My original draft of Rule 12, Factors for Accepting or Declining Jurisdiction of Appellate Special Actions, survived with modest modifications as the rule eventually adopted. That rule remedies the almost-complete lack of specification in the current Rules of Procedure for Special Actions as to when our appellate courts will exercise their discretion to take jurisdiction of a given special action, which has been a major omission. Rule 12(b)(7), which I proposed, marks the first attempt in our law at explaining when our appellate courts will and will not exercise their discretion to take jurisdiction of special actions arising from decisions on dispositive motions. My proposal to create a new rule that would allow Superior Court judges to certify decisions for special action review was adopted as Rule 13, Designation of a Question for Special Action Review. My proposal for codifying practices concerning stays in special actions was adopted with some additions in Rule 16, Procedures for Stay Requests in Appellate Special Actions. I also worked in the editorial group that reviewed and finalized the entire set of rules at the close of the Task Force's work, making modest modifications throughout the entire set of rules, along with Justice Kathryn

King, Chief Judge Garye Vásquez of Division Two of the Court of Appeals, and lawyers Eric Fraser and Chas Wirken.

B. <u>Offering Input To Judicial Ethics Opinions</u>

From July 2017 to June 2023, I was a member of the Judicial Ethics Advisory Committee ("JEAC"), a group appointed by the Arizona Supreme Court, and consisting otherwise of active or retired judges from various Arizona benches. For all but the last three months of that time, I was its sole lawyer-member. The opinions in the group in this period of time were drafted by staff, with editorial guidance from judicial members. Like other members of the group, I reviewed the draft opinions and offered comment and editorial suggestions as appropriate. Some of my editorial suggestions were incorporated into judicial ethics opinions issued by the JEAC.

20. Have you practiced in adversary proceedings before administrative boards or commissions? **No.** If so, state:

While this question calls for adversary proceedings, I was counsel in a hearing before the Town of Marana's Planning Commission to argue that a variance should be granted. That application was successful.

a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency. **Not applicable.**

b. The approximate number of these matters in which you appeared as:

Sole Counsel:	**None.**
Chief Counsel:	**None.**
Associate Counsel:	**None.**

21. Have you handled any matters that have been arbitrated or mediated? Yes. If so, state the approximate number of these matters in which you were involved as:

Sole Counsel:	**10**
Chief Counsel:	**6**
Associate Counsel:	**2**

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case: and (4) a statement of any particular significance of the case.

1. *Oro Valley Shopping Center, LLC v. Town of Oro Valley, et al.*, Case No. C20045118 (Pima County Superior Court).

(1) This case was filed on September 17, 2004 and dismissed after settlement on May 18, 2005.

(2) Opposing counsel was C. Brad Woodford (deceased), Moyes Storey, Viad Corporate Center, 1850 N. Central Avenue, Suite 1100, Phoenix, Arizona, 85004-0001.

(3) This case concerned what we believed were arbitrary actions in violation of the Arizona and United States Constitutions that thwarted a developer's plan to develop a commercial property in Oro Valley. We sued, alleging a taking and violations of the property owners' rights to due process.

(4) This case was significant in reaffirming the protections against takings without just compensation in Article 2, Section 17 of the Arizona Constitution and the Fifth Amendment to the United States Constitution. It underscored that municipalities cannot act arbitrarily toward persons or corporations in failing to respect their rights to property, and in failing to provide them the process they are due under the Arizona Constitution in Article 2, Section 4, and the Fourteenth Amendment to the United States Constitution with respect to deprivations of property rights.

2. *Brill et al v. Bank of America*, Case No. 2:16-cv-03817-DLR (United States District Court for the District of Arizona)

(1) This case was filed on November 3, 2016 and dismissed while the settlement was approved and judgment entered on September 15, 2017.

(2) Opposing counsel was David J. Stanoch of Golomb & Honik, P.C., 1515 Market Street, Suite 1100, Philadelphia, Pennsylvania, 19102. He is now with Kanner & Whiteley, 701 Camp Street, New Orleans, Louisiana, 70130, (504) 524-5777, d.stanoch@kanner-law.com.

(3) This was a putative class action concerning fees charged to persons released from incarceration by the State of Arizona.

(4) The settlement was approved by the District Court and provided significant benefits to the putative class in relation to the fees relevant to the complaint and also provided for a significant separate payment to a charity.

3. *Velez v. Reflections at the Buttes*, Case No. C20054383 (Pima County Superior Court)

(1) This case was filed on August 5, 2005 and dismissed after settlement on April 12, 2006.

(2) Opposing counsel was Clifford B. Altfeld of Leonard Felker Altfeld Greenberg & Battaile, P.C., 250 N. Meyer Avenue, Tucson, Arizona 85701 (deceased).

(3) This was a case involving a family that could not obtain a refund of much of its limited savings after booking a wedding chapel when the wedding was canceled long in advance.

(4) The case was pro bono and significant to the family, because it had lost a large chunk of the family's savings. By getting the funds back, a family was made whole.

23. Have you represented clients in litigation in Federal or state trial courts? **Yes.** If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: **85**

State Courts of Record: **160**

Municipal/Justice Courts: **5**

The approximate percentage of those cases which have been:

Civil: **100%**

Criminal: **0%**

The approximate number of those cases in which you were:

Sole Counsel:	**5**
Chief Counsel:	**190**
Associate Counsel:	**50**

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion:	**50%**
You argued a motion described above	**8%**
You made a contested court appearance (other than as set forth in the above response)	**8%**
You negotiated a settlement:	**25%**
The court rendered judgment after trial:	**0%**
A jury rendered a verdict:	**1%**

The number of cases you have taken to trial:

Limited jurisdiction court	0	
Superior court	4	**Additionally, I tried two-day preliminary injunction hearings in two other cases.**
Federal district court	2	**Additionally, I argued a preliminary injunction in another case.**
Jury	4	**Additionally, I helped select jurors at the start of a fifth jury trial that other lawyers then tried.**

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

24. Have you practiced in the Federal or state appellate courts? **Yes.** If so, state:

The approximate number of your appeals which have been:

Civil:	**230**
Criminal:	**0**
Other:	**0**

The approximate number of matters in which you appeared:

As counsel of record on the brief:	**180**
Personally in oral argument:	**60**

25. Have you served as a judicial law clerk or staff attorney to a court? **No.** If so, identify the court, judge, and the dates of service and describe your role. **Not applicable.**

26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

1. *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.,* 832 F.3d 1154 (9th Cir. 2016), *cert. denied*, 582 U.S. 931 (2017).

(1) <u>Dates:</u>

The case was filed on April 17, 2013, and barring appeal, terminated on summary judgment in favor of Wells Fargo on January 11, 2019.

(2) <u>Conducted in</u>:

(a) The United States District Court for the District of Nevada, before the Honorable Philip M. Pro (before the case was appealed to the Ninth Circuit and thus before our Firm's

involvement), and upon remand, before the Honorable James C. Mahan;

(b) The United States Court of Appeals for the Ninth Circuit, before the Honorable Dorothy W. Nelson, the Honorable J. Clifford Wallace, and the Honorable John B. Owens; and

(c) The United States Supreme Court, which declined to hear the case upon a Petition for Writ of Certiorari.

(3) Counsel for each party:

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(4) Summary.

The case was one of several hundred filed in the past decade under the greatly contested Nevada Revised Statute ("NRS") 116.3116 et seq., a statute under which the foreclosure of homeowners' association liens wipes out first position mortgages, resulting in damage to mortgage banks and homeowners. In this case, Bourne Valley Court Trust, a purchaser at an HOA foreclosure sale of one such property, sued to quiet title in itself to that property. Wells Fargo defended on the basis that NRS 116.3116 et seq. was unconstitutional, and lost in the District Court.

(5) Significance.

The case was significant because through our briefs and argument, we persuaded the Ninth Circuit to reverse and hold that NRS 116.3116 was facially unconstitutional. The Ninth Circuit held that Nevada's statute violated the U.S. Constitution's Due Process Clause by authorizing the parties to a Nevada HOA sale to destroy the property interest of the holder of a secured interest without prior notice to them. It was also significant because there were then over 2,000 homes in this position (as was conservatively estimated by the investors on the other side of the issue), making the issue a $40 million problem.

This case's significance was underscored by the U.S. Supreme Court practice, in which Bourne Valley and amici challenged the Ninth Circuit's decision, and Wells Fargo and its amici urged review as well to affirm the correctness of the Ninth Circuit's ruling that we had obtained.

2. *McLane v. EEOC*, 137 S. Ct. 1159 (2017) (reversing Ninth Circuit and holding that district court's decision as to whether to quash a federal agency's subpoena should be reviewed for abuse of discretion, as in the other Circuits, and not de novo, which was the Ninth Circuit's practice).

(1) This case was filed in 2012. I participated in the Ninth Circuit petition for rehearing en banc, was counsel of record as McLane requested certiorari from the United States Supreme Court, and was on the Supreme Court briefs as the Court considered the case.

(2) Conducted in:

(a) The United States District Court for the District of Arizona before the Hon. Murray Snow;

(b) In the United States Court of Appeals for the Ninth Circuit before the Hon. Paul Watford (authored), Hon. Milan Smith, and the Hon. Clifford Wallace, Circuit Judges; and

(c) The United States Supreme Court, before Chief Justice John Roberts, Justice Anthony Kennedy, Justice Clarence Thomas, Justice Ruth Bader Ginsburg, Justice Stephen Breyer, Justice Samuel Alito, Justice Sonia Sotomayor (authored), and Justice Elena Kagan.

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(4) Summary: The Supreme Court reversed the Ninth Circuit on the question of whether it could review de novo district court orders quashing in part and enforcing in part a subpoena served by the EEOC. That decision brought the Ninth Circuit into alignment with the other federal circuits that had written on the subject, so that the Ninth Circuit would defer to a district court's decision as to whether to quash a federal agency's subpoena, rather than reviewing it de novo, as the Ninth Circuit had.

(5) Significance: The Supreme Court's decision avoided the continuation of a more active approach on the part of the Ninth Circuit in administering the appropriateness of federal agency subpoenas. But more importantly – especially given the vast size of the Ninth Circuit – it lessens the likelihood of forum

shopping by federal agencies among the Circuits for jurisdictions that might be friendlier to agency objectives. This aids uniformity in the law.

3. *Nunez v. Professional Transit Management of Tucson,* 229 Ariz. 117 (2012) (redefining common carrier's duty of care to be "reasonable care," as for other tortfeasors, and no longer the prior "highest degree of care" standard).

(1) Dates:

The case was filed on January 30, 2009 in the Pima County Superior Court. The trial result was affirmed by the Arizona Court of Appeals on May 18, 2011. The Court of Appeals' decision was vacated by the Arizona Supreme Court on February 23, 2012.

(2) Conducted in:

(a) The Pima County Superior Court before the Honorable Stephen C. Villareal;

(b) The Court of Appeals, Division Two, before the Honorable Garye L. Vásquez, Honorable Virginia C. Kelly, Honorable Peter J. Eckerstrom; and

(c) The Arizona Supreme Court, before Chief Justice Rebecca White Berch, Vice Chief Justice Andrew Hurwitz (authored), Justice Scott Bales, Justice John Pelander, and Justice Robert Brutinel.

(5) Counsel:

(a) In the Pima County Superior Court:

For Era Nunez:

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In the Arizona Court of Appeals, Division Two:

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(4) **Summary: This case concerns a bus patron in a wheelchair who contended that she was entitled to damages under the legal standard of requiring the "highest degree of care" of the operator of a public conveyance. Our client PTMTI, the municipal bus company in Tucson, contended that it should be judged under the general negligence standard of "reasonable care," which would make a difference here, where the patron refused a seat belt offered by the bus driver. After the jury awarded $186,777.87 in damages and apportioned 70% of the fault against the bus driver, the Court of Appeals affirmed, but the Arizona Supreme Court reversed.**

(5) **Significance: In this case, the Arizona Supreme Court changed the standard of liability for a common carrier like a city bus company from "highest degree of care" to "reasonable care." The old standard, we argued, is hard for juries to understand,**

and in any event subjected one set of defendants and businesses to a higher degree of liability than otherwise exists for other defendants and businesses. This decision made new Arizona law and created more uniformity in the law.

4. *Greenberger v. GEICO General Insurance Company*, 631 F.3d 392 (7th Cir. 2011).

(1) Dates:

This case was filed on September 26, 2005, and was resolved by the decision of the Seventh Circuit Court of Appeals affirming summary judgment for Defendants on January 10, 2011.

(2) Conducted in:

(a) The United States District Court for the Northern District of Illinois, before the Honorable Blanche Manning, United States District Judge, and for discovery matters, before the Honorable Arlander Keys, United States Magistrate Judge; and

(b) The United States Court of Appeals for the Seventh Circuit, before the Honorable Frank Easterbrook, the Honorable Diane Sykes, and the Honorable Michael Kanne, United States Circuit Court Judges.

(3) Counsel:

(a) In the United States District Court:

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(4) Summary. Please see Confidential Section.

(5) Significance. Please see Confidential Section.

5. F&A Federal Credit Union v. Vantage West Credit Union

(1) Dates:

The case was filed in 2004. Judgment issued on March 21, 2008.

(2) Conducted in:

The Pima County Superior Court before Judge John Davis.

(3) Counsel:

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(4) Summary. Please see Confidential Section.

(5) Significance. Please see Confidential Section.

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

I was appointed to the Arizona Court of Appeals on February 17, 2023 and took the bench on March 27, 2023. My duties principally consist of working within panels of three judges to decide appeals. I also work within panels of three judges as we decide whether to take jurisdiction of particular special actions, and if so, how to resolve them. I have volunteered to do mediations, and am mediating my sixth case presently. I served within the Task Force on the Rules of Procedure for Special Actions. I also support the court's efforts to make contact with the public, provide continuing legal education

to the community, and to recruit attorneys to participate in our pro bono programs.

While I was a lawyer, I was periodically appointed to arbitrate matters assigned to compulsory arbitration in the Superior Court. One of those matters proceeded to hearing in 2009 and I issued a reasoned decision in it.

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

Case One: State v. Sidor

(1) I authored an Opinion issued on October 17, 2024 in State v. Sidor, 1 CA-CR 22-0387, 2024 WL 4511282, --- P.3d ---, joined by Judge David B. Gass, and from which Judge Michael J. Brown dissented.

(2) The Arizona Court of Appeals, Division One

(3) Counsel:

For Appellant John Joseph Sidor

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For Appellee State of Arizona

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(4) In this case, Sidor was convicted of transporting narcotic and dangerous drugs for sale after a DPS officer found cocaine and methamphetamine in a car he was driving during a traffic stop. The officer stopped Sidor for following a truck too closely after using the Drug Enforcement Administration's DEASIL database and learned the car, bearing a Minnesota plate, had traveled through western Arizona both one and two months earlier. In a ten-minute discussion during the traffic stop, the officer learned Sidor had borrowed the car from a friend who in turn borrowed it from the owner. The officer concluded he had reasonable suspicion to detain Sidor longer, and called for a K-9 officer, whose dog Turbo detected the cocaine and methamphetamine.

Sidor claimed that (1) the officer unreasonably prolonged the ten-minute discussion during the stop, (2) the officer lacked reasonable

suspicion to detain him longer than the ten-minute discussion, (3) his own behavior was not suspicious, and (4) the use of DEASIL was illegal here, because of the lack of any prior basis to suspect Sidor of illegal conduct.

The Superior Court denied Sidor's motion to suppress the drugs, and we affirmed.

(5) This was the first Opinion in Arizona addressing whether the use of DEASIL was a search within the meaning of the Fourth Amendment. We held that it was not such a search, consistent with the conclusions reached by other jurisdictions. We also explained that as DEASIL becomes more comprehensive in its surveillance, that conclusion may change, a point other courts that have decided similar issues have made. We also held that Sidor's behavior other than what the officer learned from DEASIL (such as not giving the officer a friendly wave, and holding his steering wheel at 10 and 2 o'clock) did not provide reasonable suspicion to detain him further, but that the DEASIL information showing repeat, quick-turnaround trips between Minnesota and southern California, here in a twice-borrowed vehicle, did provide the reasonable suspicion that made the Superior Court correct in denying Sidor's motion to suppress.

Case Two: Kirsten v. ADOT

(1) I authored an Opinion issued on October 1, 2024 in Kirsten v. ADOT, 1 CA-CV 24-0092, 2024 WL 4355173, --- P.3d ---, joined by Judges Maria Elena Cruz and Samuel A. Thumma.

(2) The Arizona Court of Appeals

(3) Counsel:

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For Appellee ADOT

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(4) This case concerned whether the State of Arizona may lawfully administratively suspend a driver's license for 90 days where the state has shown no impairment on the driver's part.

Kirsten was stopped for speeding by a Sedona police officer, who observed that he had bloodshot eyes, slurred speech, and was

unsteady on his feet. His blood had an alcohol content below .08, and thus did not give rise to a presumption of intoxication. Kirsten's blood also contained 11 +/- 3 nanograms per milliliter of THC, the active ingredient in cannabis.

ADOT suspended Kirsten's driver's license for 90 days. An administrative law judge upheld that suspension based upon the THC in Kirsten's blood, but not based upon impairment. The Superior Court affirmed the suspension, again relying on the presence of THC in Kirsten's blood, agreeing with the administrative law judge that "impairment was not an issue."

We reversed and vacated Kirsten's suspension, applying the plain language of A.R.S. §§ 36-2851 and -2852. The voters specified in Proposition 207, in a part of it now known as A.R.S. § 36-2851(3) , that the State can penalize drivers for driving "while impaired to even the slightest degree by marijuana." The voters also specified in Proposition 207, in a part of it now known as A.R.S. § 36-2852(B), that despite any other law, a driver can only be guilty of driving under the influence if they are "also impaired to the slightest degree." Thus, the State had to show Kirsten was at least impaired to the slightest degree. Given that the State decided not to argue for impairment below, we found the suspension of his license violated Arizona law.

(5) This case was significant because it was the first Opinion deciding that the State could not suspend a driver's license for the mere presence of THC without any showing of impairment. Practically speaking, the case may prove not to have much impact, because the State remains free to argue at an administrative hearing that the same facts that led an officer to cite a driver likewise support a finding of impairment. Thus, the significance of this case may prove to be bringing the practice in cases like this into conformance with the statute the voters passed.

Case Three: Skoglund v. Barbour

(1) I authored an Opinion issued on August 27, 2024 in Skoglund v. Barbour, 1 CA-CV 22-0514 FC, 2024 WL 3948233, --- P.3d ---, joined by Judges David B. Gass and Brian Y. Furuya.

(2) The Arizona Court of Appeals

(3) Counsel:

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(4) This case principally concerned the legal standards the Superior Court should apply when dividing businesses that are community property.

Here, former husband Barbour ("Husband") appealed the Superior Court's award of 48.835% of a community business to former wife Skoglund ("Skoglund"). The community business, VIP, originated and sold loans starting in 2006. In 2007, VIP hired Husband's friend Teegardin, who brought loans and employees. Teegardin was critical to getting VIP through the Great Recession. Years later, Husband gave Teegardin ownership shares. The Superior Court agreed with Wife that the shares were a gift to which Wife had not consented, which necessarily breached fiduciary duties Husband owed Wife, and that gifting the shares achieved no "demonstrable benefit to the community."

We reversed, rejecting the arguments of both parties. We rejected Wife's position that gifts to which Wife did not consent automatically violated fiduciary duties, because, we explained, such gifts could serve legitimate business purposes and could enrich the marital community. We rejected Husband's position that mere good faith insulated Husband from claims that he breached fiduciary duties to Wife. We then explained the right criteria to apply in deciding whether Husband breached fiduciary duties to Wife. The Superior Court must first look to a group of factors tending to suggest breaches of fiduciary duties from our cases Gerow v. Covill, 192 Ariz. 9 (App. 1998) and Mezey v. Fioramonti, 204 Ariz. 599 (App. 2003). These factors include notice to Wife (or its lack), Wife's acquiescence to the gift (or its lack), benefit to Husband, whether Husband gave the gift to aid his divorce planning, and whether the gift was so large as to be unfair or disproportionate in light of Teegardin's past contributions. Yet even if Husband did not violate those duties, which are specific to spouses in the business context, the Superior Court must also consider whether Husband violated the duties ordinary business partners owe each other. Thus, the court must consider whether the transfer to Teegardin, considered as a business decision, violated Husband's duties of care and loyalty to Wife as a shareholder.

(5) This case was significant because it explained how to resolve the important problem that recurs in Arizona's family court: how to divide a business owned by the marital community.

Case Four: Gallery Community Association v. K. Hovnanian at Gallery, LLC

(1) I authored an Opinion issued on August 6, 2024 in Gallery v. K. Hovnanian, 1 CA-CV 23-0375, 2024 WL 3673743, --- P.3d ---, joined by Judges Jennifer M. Perkins and David D. Weinzweig.

(2) The Arizona Court of Appeals

(3) Counsel:

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(4) This is a case about whether A.R.S. §§ 33-2001 and -2002 authorize homeowners' associations ("HOAs") to bring claims for breach of the implied warranty of workmanship and habitability as homeowners' association dwelling actions. The claims at issue here were for construction defects in HOA common areas and in property the HOA did not own but was required to maintain, like home exteriors.

The Superior Court here agreed with the developer K. Hovnanian that Gallery Community Association ("the HOA") could not sue for breach of that implied warranty. The court reasoned that the HOA was not a homeowner, and that the implied warranty was one held by the homeowner.

We reversed, explaining that A.R.S. § 33-2002(A) authorizes HOAs to file a homeowners' association dwelling action. Such an action is defined by statute to include any construction defect defined in A.R.S.

§ 12-1361 arising out of the design or construction of a dwelling. We then explained that A.R.S. § 12-1361 includes failing to adhere to standards of workmanship.

(5) This was the first Opinion deciding whether HOAs may sue in their own interest for breaches of the implied warranty of workmanship and habitability. This issue, and closely related issues, are the subject of substantial litigation in Arizona, making the resolution of these questions here significant.

Case Five: State v. Colorado, 256 Ariz. 97 (App. 2023)

(1) I authored an Opinion issued on August 17, 2023 in State v. Colorado, joined by Judges David Gass and Brian Furuya.

(2) The Arizona Court of Appeals

(3) Counsel

For Appellant Justin Colorado

Joseph Adam Carver

For Appellee the State of Arizona

Brian R. Coffman

(4) This was an appeal from a conviction for first-degree murder, questioning the seating of a juror after changes to Arizona's court rules after the abolition of peremptory challenges (strikes of jurors without cause).

Appellant Colorado contended that after the Arizona Supreme Court abolished peremptory challenges, Arizona courts should review the Superior Court's decisions to strike jurors less deferentially. We explained that throughout Arizona's history, we have always substantially deferred to the Superior Court's decisions about whether to strike a juror. We also explained that the Arizona Supreme Court, in abolishing peremptory challenges, could have changed, but did not change, the standards for reviewing the Superior Court's decisions about whether to strike particular jurors for cause.

(5) This Opinion was significant because it was one of the first precedents construing the revised rules of procedure that were put into effect with the abolition of peremptory challenges. The law under these new rules is still developing, and how they are interpreted matters and significantly affects how jury trials will be conducted.

29. Describe any additional professional experience you would like to bring to the Commission's attention.

I worked in Snell & Wilmer as Loss Prevention Counsel from May 2006 until I left the Firm in March 2023. I was the Tucson office's Loss Prevention Counsel continuously in that time, and served the Phoenix office in that capacity from January 2017 to March 2023, standing in for our actual General Counsel once while she was away for trial. As Loss Prevention Counsel, I represented the Firm, and also counseled attorneys on professional responsibility and ethics issues. The Firm had few Loss Prevention Counsel, and this work helped make my practice style more conservative and more precise. By policy, our Firm's Loss Prevention Counsel were involved when either side in a suit requested sanctions. We sought ways around retributive sanction practice, and sought to keep difficult disputes among lawyers from escalating. The experience of working on situations in which there were suggestions of problems with lawyering or professional responsibility issues gave me a more robust sense of the practice of law, and of interactive problems lawyers have with each other, and with clients. It led me to the view that sanctions are sometimes overused and can needlessly deepen and prolong litigation. It also sensitized me to the difficulties with stress and addiction in the practice of law – issues that affect lawyers and their clients, and which spill over into lawyer discipline as well. This experience helps give me perspective on the litigation process, which I believe aids me as a judicial officer.

I was also a member of my Firm's ethics committee from roughly 2010 to 2020, and during that time taught Professional Responsibility, as noted in my answer to question 14. In June 2022, the Firm asked me to serve as Co-Chair of the Ethics Committee, returning me to significant responsibility in that area. I was also appointed by the Arizona Supreme Court to the Judicial Ethics Advisory Committee. Working difficult ethical problems and helping lawyers with ethical issues deepened my understanding of the practice of law and issues lawyers and their clients encounter. I also worked as an expert on rules of civil procedure as they affected particular lawyer discipline, as consulting appellate counsel on the prosecuting side in a difficult disciplinary matter, and as contributing defense counsel in a professional responsibility matter. Studying the rules, working with the rules, and working in our disciplinary system gave me additional depth that has assisted me as a judicial officer.

BUSINESS AND FINANCIAL INFORMATION

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **No.** If so, give details, including dates.

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No.** If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? **Not applicable.** If not, explain your decision.

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes.** If not, explain.

33. Have you paid all state, federal and local taxes when due? **Yes.** If not, explain.

34. Are there currently any judgments or tax liens outstanding against you? **No.** If so, explain.

35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **No.** If so, explain.

36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **Yes.** If so, identify the nature of the case, your role, the court, and the ultimate disposition.

1. In April 2004, a car I was driving was stopped at a red light at a downtown Tucson intersection, as two colleagues and I were returning from lunch, when another car rear-ended my stopped car at a speed of roughly 30 mph without attempting to brake, resulting in injuries to my back. I brought suit against the motorist in Jacobs v. Abston. It was filed in Pima County Superior Court, Case No. 20061859. I eventually settled it in 2007 for $9,000 with the motorist's insurer, and the case was dismissed with prejudice.

2. By way of further answer to this question, please see my answer describing the lawsuit Cain v. Fidelity, et al., described fully below in my answer to question 42. As noted there, the suit was won on motions to dismiss without discovery being taken.

37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No.** If so, explain.

38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No.** If so, explain.

CONDUCT AND ETHICS

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No.** If so, provide details.

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No.**

    If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition.

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **None.**

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice.

My former law firm was sued in two matters on which I worked. The first matter (which defendants won on motions to dismiss, without any discovery being taken) is one that accused everyone named as a defendant of wrongdoing concerning law practice. I do not understand the allegations of the second case to be of wrongdoing concerning my law practice, as one of my Firm's partners was sued personally and I was not, but I describe it nonetheless to be sure to provide a fulsome response.

1. Our Firm represented two alleged bona fide purchasers of a piece of land in the case Cain v. Fidelity, in which the purchaser of a tax lien, David Cain, sued a variety of parties in relation to the parcel. Fidelity lost the case in the Superior Court, and I did not participate in the matter in the Superior Court. I handled the unsuccessful appeal of the judgment against our Firm's clients to the Arizona Court of Appeals, Division Two. Our Firm's clients did not appeal to the Arizona Supreme Court.

After that litigation concluded, Mr. Cain sued two title companies, three law firms, four land-investment LLCs, and eleven persons associated with those

entities and their spouses. This array of defendants, including myself and my spouse as nominal community defendant, were sued for supposed abuse of process, wrongful institution of civil proceedings, intentional infliction of emotional distress, aiding and abetting tortuous [sic] conduct, and fraudulent conveyance.

Mr. Cain's suit was dismissed by the Maricopa County Superior Court, and after one claim was reinstated by the Arizona Court of Appeals, Division One on appeal, it was dismissed again by the Maricopa County Superior Court. Mr. Cain then unsuccessfully appealed to the Arizona Court of Appeals, and later, the Arizona Supreme Court.

2. In 2010 and 2011, our Firm represented a trustee of a trust in O'Donnell v. O'Donnell, including in a three-week trial before the Honorable Gary Donohoe in Maricopa County Superior Court in which I participated with three other lawyers in my Firm. The Superior Court ruled against our client on the matter tried to the Court.

Subsequently, our Firm sued for unpaid fees, and our Firm's client counterclaimed, asserting that the Firm had an undisclosed conflict in the matter owing to specific facts relating to another partner (not myself). The suit named our Firm and that partner as a defendant but not me personally. (A second partner was named as a defendant as well, because they are the spouse of the attorney who was named.) The matter is no longer pending. While in a sense this case does not fall within the scope of this question 42 as I understand its allegations, I did not want to omit to list it, to be sure to provide a full response.

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42. **None.**

44. List and describe any sanctions imposed upon you by any court. **None.**

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **No.** If so, in each case, state in detail the circumstances and the outcome.

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No.** If your answer is "Yes," explain in detail.

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **No.** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.

48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No.** If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No.** If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties.

PROFESSIONAL AND PUBLIC SERVICE

50. Have you published or posted any legal or non-legal books or articles? **Yes.** If so, list with the citations and dates.

I have written five articles published in academic law reviews. The first three were written during my last semester of law school as part of what I planned as a book-length study of how movements for rights seek to attain legitimacy for their claims of rights. The last two were written while I was working as an associate at Jenner & Block, the final of these because one of the earlier articles was quoted in a dissent in a U.S. Supreme Court case. They are:

"Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights," 1996 Wis. L. Rev. 893 (1996);

"God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric," 63 U. Cin. L. Rev. 1119 (1995);

“Rhetoric and the Creation of Rights: MacKinnon and the Civil Right to Freedom From Pornography,” 42 Kan. L. Rev. 785 (1994);

“The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991,” 72 Neb. L. Rev. 723 (1993) (quoted in Romer v. Evans, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting)); and

“The Right To Die Movement in Washington: Rhetoric and the Creation of Rights,” 36 How. L.J. 185 (1993).

I have written (or co-written) three articles for trade publications. They are:

"Important Changes to the Rules Governing Service, Filings, Motions, and Pleadings," Co-Authored with the Hon. Douglas Metcalf, Arizona Attorney (December 2016)

"The Class Action Fairness Act of 2005 Turns Five: Some Birthday Thoughts," Presenter, American Bar Association Commercial & Business Litigation Journal, Vol. II, No. 2 (Spring 2010); and

“Making the Selection of Business Insurance Less Painful,” July 19, 2002, Inside Tucson Business.

I have been quoted in articles that I did not author. These include:

“Crash Kills Lawyer Day He Pens Friend’s Endorsement,” Arizona Capitol Times (February 15, 2019);

"2 Arizona attorneys offer impressions of U.S. Supreme Court nominee Neil Gorsuch," Arizona Republic (January 31, 2017);

"Appellate Practices Turn Profits, Perform Pro Bono Work and Recruit a Different Breed," Featured, Of Counsel Vol. 32 No. 4 (April 2013);

"The AmLaw Pro Bono 100," Quoted, The American Lawyer (July 2009); and

"Insurance, An Active Approach," Quoted in G. Koprowski, Washington Post, at HO1 (August 24, 2002).

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes.** If not, explain.

52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? **Yes.** If so, describe.

Undergraduate Courses on Law:

I have taught one undergraduate course. In the Fall 1991 semester, I was a teaching fellow for the Harvard College undergraduate survey course, "What Is Law?", taught by Professor Peter Berkowitz. I believe this course was listed as Moral Reasoning 58 in the undergraduate course catalog. The course concerned historical, religious, and civil bases for systems of law. I was responsible to lead a weekly discussion section for 16 undergraduates, and to grade their final examination.

Law School Courses:

I have taught three law school courses. I taught the first two at the University of Arizona's James E. Rogers College of Law. In the Spring 2006 semester, I taught Legal Writing as an Adjunct Professor. In the Fall 2006 semester, I taught Civil Rights Litigation. I taught the third course at Arizona State University's Sandra Day O'Connor College of Law. In the Fall 2017 semester, I taught "Professional Responsibility," listed as LAW 638, as an adjunct professor. On February 26, 2024, at the invitation of Judge Greg Sakall, who teaches Law 389 at the University of Arizona, I gave a speech about the jurisprudence of Lewis Powell called "The Path Not Taken."

Conferences and Continuing Legal Education Seminars:

I have designed and presented continuing legal education and speeches at conferences over the last twenty years, and greatly enjoy these experiences. Highlights include appearing on the panel "Conversation With the Justice" with Justice Anthony Kennedy at the conclusion of the 2012 Ninth Circuit Judicial Conference, being invited by the Federal Judicial Center to speak at its national workshop on establishing and managing programs concerning pro se litigants, and co-chairing the litigation track at CLE By the Sea in 2017 focusing on rules reform. I was also excited to help lead the public education with then-Vice Chief Justice Brutinel and others on the 2018 revisions to the Arizona Rules of Civil Procedure, and am excited again to help with the public education on the newly-revised Rules of Procedure for Special Actions. My presentations (and judicial co-presenters) include the following:

"The Ins and Outs of the New Arizona Rules of Procedure for Special Actions," Arizona Court of Appeals, Phoenix (October 28, 2024);

"Collaborative Bar: Special Action CLE," The Collaborative Bar, Zoom (October 8, 2024);

"Fulfilling the Promise of *Batson*: Recent Reforms in Jury Selection," Lavender Law, Washington, D.C. (August 9, 2024);

"Evidence and Case Update and Judicial Panel," CLE By the Sea, Coronado, California (July 10, 2024);

"Leveraging Expert Witness Testimony to Benefit Your Case," CLE By the Sea, Coronado, California (July 9, 2024);

"Evidence Update," State Bar Convention, Phoenix (June 14, 2024);

"Meaningful Integration: DEI Not Just a Buzz Term," Arizona Women Lawyers Association, Arizona State Bar, Phoenix (June 13, 2024);

"Appellate Roadshow CLE: Juvenile Law," State Bar of Arizona, Phoenix (April 25, 2024);

"Supreme Court Review," District of Arizona Conference, Tucson (April 19, 2024);

"Special Action Proposed Rule Changes," Arizona Women Lawyers Association, Zoom (March 11, 2024);

"Political Wellness Event," Arizona State University Law School, Phoenix (with Justice Lopez) (February 21, 2024);

"2024 Civil Procedure Updates," Arizona State Bar, Phoenix (January 25, 2024);

"SCOTUS Review," American Constitution Society, Phoenix (with Judge Desai) (October 18, 2023);

"Statutory Construction: A Judicial Perspective," National Conference of State Tax Judges, Phoenix (with Justice Bolick) (September 22, 2023);

"How to Bring Equality to the Legal Profession & How Allies Can Help," Arizona Women Lawyers Association, Arizona State Bar (June 14, 2023);

"Paths to the Bench," American Constitution Society, Phoenix (April 1, 2023);

"New Approaches in Avoiding Racial Bias in Jury Selection," Panel Moderator, Bank of America (July 27, 2022);

"Arizona Makes History: A Discussion of the Elimination of Peremptory Challenges," Snell & Wilmer/External Audience, Phoenix (June 2, 2022);

"Arizona Makes History: A Discussion of the Elimination of Peremptory Challenges," Phoenix (May 24, 2022);

"Arizona Makes History: A Discussion of the Elimination of Peremptory Challenges," Snell & Wilmer, Tucson (with Pima County Attorney Laura Conover) (March 23, 2022);

"2022's Major Civil Rules Amendment: The Elimination of Peremptory Challenges and Its Impact on Voir Dire," Arizona State Bar, Phoenix (with Judges Viola and Gates) (January 20, 2022);

"Writing Program: What Is Your Mapping Program?," Snell & Wilmer (January 13, 2022);

"Supreme Court Review," American Constitution Society, Panel Moderator, Phoenix (with Judge Hurwitz) (September 13, 2021);

"Current Issues in Civil Litigation," Arizona State Bar, Phoenix (with Washington Supreme Court Justice Gonzalez, Judge Swann) (June 18, 2021);

"Learning to Utilize the Certified Arbitrator Program, Fair Limits Proceeding, and Other Civil Practice Innovations," Arizona State Bar, Phoenix (with Judge Gates) (March 24, 2021);

"Litigation Training: Rules Review, Federal, State, and Local," Snell & Wilmer, Firmwide segment and Phoenix/Tucson segment (March 23, 2021);

"Alternative and Virtual Hearings and Trials: Best Practices, Lessons Learned, and Novel Legal Issues in the Covid-19 World," Arizona State Bar, Phoenix (with Judge Gates) (December 2, 2020);

"Supreme Court Review," American Constitution Society, Panel Moderator, Phoenix (with Judge Hurwitz) (September 17, 2020);

"10 Tips in 50 Minutes," Arizona State Bar, Phoenix (with Judge Howe) (September 17, 2020);

"Maricopa County Arbitration and Case Management Innovations – ADR Innovations and Opportunities," Arizona State Bar, Phoenix (with Judge Gates) (September 9, 2020);

"Western States Road Trip: Financial Services Litigation in the Covid-19 Era," Snell & Wilmer/External Audience (July 20, 2020);

"The Future of Civil Trials in Maricopa County With Judge Pamela Gates," Arizona Women Lawyers Association (with Judge Gates) (July 13, 2020);

"The Future of Civil Trials," Maricopa County Bar Association (with Judge Gates) (June 5, 2020);

"Covid-19's Impact on Financial Services Litigation," Snell & Wilmer/External Audience (May 6, 2020);

"The Whys and Hows of Organization: Outlines, Analysis, and Structure in Your Legal Writing," Snell & Wilmer, Phoenix (January 15, 2020);

"A View From the Trenches," Arizona State Bar Supreme Court Review, Panel Moderator, Phoenix (November 22, 2019);

"Justice Bales Retrospective," Panel Moderator, Phoenix (with Justice Timmer and Judge Hurwitz) (November 15, 2019);

"Appeals: Start to Finish," Maricopa County Bar Association Paralegal Association, Phoenix (November 8, 2019);

"Looking Back at the U.S. Supreme Court's 2018-2019 Term," American Constitution Society, Panel Moderator, Phoenix (with Judge Hurwitz) (September 19, 2019);

"How the New Civil Practice Rules Are Working and How They Will Affect You," Arizona State Bar Convention, Panel Moderator, Phoenix (with Judges Gates, McCarville, and Woods) (June 27, 2019);

"Changing Rules, Changing Times: How the New Rules Are Working, and What You Need to Know," Arizona Paralegal Association 2019 Annual Conference, Phoenix (May 3, 2019);

"Paths to the Bench," Panel Moderator, American Constitution Society, Phoenix (with Judge Cruz) (January 24, 2019);

"Working With the Arizona Court of Appeals," Appellate Case Update, Tempe (with Judge Warner) (November 30, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," at Beus Gilbert, Phoenix (September 24, 2018);

"Supreme Court Review," American Constitution Society, Panel Moderator, Phoenix (with Judge Hurwitz) (September 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Presented to Guests of Integrated Medical Evaluations, Phoenix (August 23, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," at Fennemore Craig, Phoenix (July 19, 2018);

"The 2018 Revisions to the Arizona Rules of Civil Procedure: What You Need to Know," NALS of Phoenix (July 12, 2018);

"Not So Stranger Things: Becoming Acquainted With Arizona's New Civil Rules," Arizona State Bar Convention, at Wild Horse Pass (with Justice Brutinel) (June 27, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Solo and Small Firm Practice Section, Phoenix (with Judge Agne) (June 15, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Arizona Women Lawyers Association, Phoenix (with Justice Brutinel) (May 30, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Arizona Association of Defense Counsel (May 9, 2018);

2018 Civil Practice and Procedure Symposium, Appellate Practice Seminar, Phoenix (with Chief Justice Bales) (April 30, 2018).

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Maricopa County Attorney (April 20, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," to the Sandra Day O'Connor Inn of Court, Phoenix (April 17, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Aiken Schenk (April 11, 2018);

Rules Update and Game Show, Coconino County Bar Association, Flagstaff (April 10, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Lang & Klain, Scottsdale (April 4, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Scottsdale Bar Association (with Justice Brutinel) (March 13, 2018);

"A Year of Decision," Panel Moderator, American Constitution Society, Phoenix (March 5, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Group of Private Counsel, Tucson (March 2, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Snell & Wilmer, Tucson (February 8, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Bowman Brooke, Phoenix (February 1, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Yavapai County Bar Association, Prescott (with Justice Brutinel and Judge Trebesch) (January 31, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Ballard Spahr (January 30, 2018);

Rules Update, Perkins Coie, Phoenix (January 25, 2018);

"What You Need to Know About the 2018 Revisions to the Arizona Rules of Civil Procedure," Maricopa County Association of Paralegals (with Judge Agne) (January 24, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Office of the Arizona Attorney General, Phoenix (January 22, 2018);

"Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure," Snell & Wilmer, Phoenix (January 16, 2018);

“Proportionality Takes Center Stage: The 2018 Revisions to the Arizona Rules of Civil Procedure,” ASU Alumni Law Group, Phoenix (January 12, 2018);

“2018 Civil Justice Reforms – Case Management, ESI, and More,” Chair and Presenter, Arizona State Bar Midyear Rules CLE, Phoenix (January 7, 2018);

Update on the Upcoming 2018 Rule Changes, Sacks Tierney, Scottsdale (December 11, 2017);

“Changing Times, Changing Rules: Revisions to the Arizona Rules of Civil Procedure Taking Effect in 2018,” Pinal County Bar Association, in Florence (December 4, 2017);

"The Lively Art, Arguments That Mattered, and Perspectives on Dissent," Moderator & Panelist, CLE By the Sea, at Coronado, California (with Chief Justice Bales and Judge Norris) (July 12, 2017);

"Better, Faster, Cheaper: Case Management Reforms Coming to a Court Near You," CLE By the Sea (July 11, 2017);

"Meet the New Rules: The Restyled Arizona Rules of Civil Procedure," Panelist, CLE By the Sea (July 10, 2017);

2017 Changes to the Arizona Rules of Civil Procedure, Presenter, Thurgood Marshall Inn of Court, Phoenix (March 22, 2017);

2017 Changes to the Arizona Rules of Civil Procedure, Presenter, Scottsdale Bar Association (February 14, 2017);

2017 Rules Update and Preview of 2018 Changes, Presenter, to the Office of the Arizona Attorney General, Phoenix (February 7, 2017);

2017 Changes to the Arizona Rules of Civil Procedure, Snell & Wilmer, Tucson (February 2, 2017);

2017 Rules Update, Rusing & Lopez, Tucson (January 17, 2017);

"A Time of Change: The 2017 ARCP Revisions, and Proposals for 2018," Chair and Presenter, Arizona State Bar Midyear Rules CLE (January 11, 2017);

2017 Rules Update, The Udall Law Firm, Tucson (December 20, 2016);

"Are You Ready for the 2017 Arizona Rules Amendments," Pima County Bar Association, Tucson (December 9, 2016);

"A Call to Reform," Presenter, Arizona Judicial Council, Court Leadership Conference, Flagstaff (October 26, 2016);

"Innovations: Civil: Committee on Civil Justice Reform," Arizona Judicial Conference, Tucson (June 22, 2016);

"Where We're Going, We Still Need Rules," Arizona State Bar Convention (June 15, 2016);

"Catch the Wave: Sea Changes in the Federal and Arizona Rules of Civil Procedure," Arizona State Bar Midyear Rules CLE, Phoenix (February 12, 2016);

Civil Rules Update, Office of the Arizona Attorney General, Phoenix (January 22, 2016);

"Civil Litigation Rules Update," Arizona State Bar Convention (June 24, 2015);

"The Rules They Are A-Changin' (Again)," Arizona State Bar Midyear Rules CLE, Phoenix (January 22, 2015);

"Loss Prevention Jeopardy!," Snell & Wilmer Attorney Retreat, Phoenix (May 18, 2013);

"Conversation with Justice Anthony Kennedy," Ninth Circuit Judicial Conference, Lahaina, Hawaii (August 16, 2012);

"Innovative District Programs and Resources; Doing More With Less: Creative Pro Bono Programs," Chief District Judges Conference, San Diego, California (January 12, 2012);

"Bench-Bar Civil Session Concerning the Selective Enforcement of Rules and E-Discovery," Ninth Circuit Judicial Conference, San Diego, California (August 18, 2011);

"Pro Se Program Administration," Panel Moderator/Panelist, Federal Judicial Center National Workshop for Pro Se Law Clerks, Chicago, Illinois (October 2010);

"The Supreme Court During the Bush Administration," District of Arizona Conference, Tucson (February 2009);

"Changes to the Federal Rules of Evidence Concerning Experts," Moderator, District of Arizona Conference, Phoenix (February 2008);

"Representing Pro Per Clients in Appointed Matters," District of Arizona Judicial Conference (February 10, 2006); and

"How to Litigate Cases Under 42 U.S.C. § 1983," Presented at the United States District Court for the Northern District of Illinois (August 1998).

I gave additional presentations not listed above within the period 2015-18, all for the purposes of performing education on changes to the Arizona Rules of Civil Procedure. I did not plan to seek CLE credit for them because of their number, and I therefore omitted to document all of them at the time. While the above is my best reconstruction of my presentations, I estimate that I participated in 5-10 additional rules education panel presentations in that time period.

Additionally, as Loss Prevention Counsel in the Tucson office of Snell & Wilmer, I gave loss prevention trainings of roughly one hour in length in 2006, 2007, 2008, 2009, and 2010 to attorneys (specific dates unknown), and on December 5, 2011, December 6, 2011, November 26, 2012, December 10, 2012, December 19, 2012, December 4, 2013, December 18, 2013, December 5, 2014, December 8, 2014, August 12, 2015, December 7, 2015, December 9, 2015, November 29, 2016, and December 19, 2016.

53. List memberships and activities in professional organizations, including offices held and dates.

Current Memberships

Arizona State Bar (2001-present)

Nevada State Bar (2012-present)

Maricopa County Bar Association (2017-present)

Fellow, American Academy of Appellate Lawyers (2018-present)

Arizona Women Lawyers Association (2018-present)

Arizona LGBT Bar Association (2019-present)

American Law Institute (2022-present)

Arizona Asian American Bar Association (2023-present)

Los Abogados (2023-present)

International Association of LGBTQ+ Judges (2024-present)

Discontinued Memberships

American Bar Association, Member (1993-2023)

- **Commercial and Business Litigation Section, Class Action Subsection, Co-Chair (2009-2011)**
- **Program Committee (2011)**
- **Litigation Section (1993-2023)**
- **Professional Responsibility Section (1993-2023)**
- **Tort & Insurance Practice Section (periodic between 1993-2012)**

Illinois State Bar Association (1993-2001)

Chicago Bar Association (1993-2001)

Tucson Defense Bar (periodic between 2002-2013)
Federal Bar Association (periodic between 2002-2023)

Fellow, Litigation Counsel of America (2014-2023)

Pima County Bar Association (2002-2023)

Seventh Circuit Bar Association (approximately 1998-2014)

Arizona's Finest Lawyers (2013-2014, ceased paying dues)

American Constitution Society, Arizona Lawyer Chapter, President (2018-2022), Co-President (2022-23).

Arizona Judges' Association (2023-2024)

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **Yes.**

For the Ninth Circuit Court of Appeals

Member, Ninth Circuit Lawyer Representatives Coordinating Committee (2007-2012);

Member, Conference Executive Committee (2009-2012);

Ninth Circuit Advisory Committee on Rules and Civil Practice (2008-2012);

Lawyer Coordinator, Ninth Circuit Pro Bono Program, Arizona and Nevada (2007-present); and

Presenter/Organizer, Panels, Conferences of the Chief District Judges (2008, 2009, 2011).

<u>For the United States District Court, District of Arizona</u>

Founder and Coordinator, District of Arizona pro bono program (2007-14);

District Court-appointed Lawyer Representative (2006-2009, including 2008-09 Chair); and

Presenter, Various Panels, District of Arizona Conferences (2006, 2008, 2009).

<u>Arizona State Bar Service/Arizona Supreme Court Appointments</u>

Judicial Performance Review Commission (2009-2016);

Member, State Bar Civil Procedure and Practice Committee (2009-present);

Member, Task Force on the Arizona Rules of Civil Procedure (2014-2016);

Member, Committee for Civil Justice Reform (2015-2017);

Member, Judicial Ethics Advisory Committee (2017-present);

Member, Commission on Jury Data Collection, Practices, and Procedures, and its separately identified subgroup, the Statewide Jury Selection Workgroup (2021-22); and

Member, Task Force on the Rules of Procedure for Special Actions (2023-2024).

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

Offices in Bar Associations or Bar Committees

President, Arizona Lawyer Chapter, American Constitution Society (2018-22), Co-President (2022-23);

State Bar of Arizona, Chair, Civil Practice and Procedure Committee (2014-18); and

American Bar Association, Commercial and Business Litigation Section, Class Action Subsection, Co-Chair (2009-11).

Offices in Court Service Organizations and Committees

Leader, Working Group Two, Committee on Civil Justice Reform (appointed to Committee by Arizona Supreme Court) (2015-17);

Leader, Working Group One, Task Force on the Arizona Rules of Civil Procedure (appointed to Task Force by Arizona Supreme Court) (2014-16);

Chair, Lawyer Representative Coordinating Committee, Ninth Circuit Court of Appeals (2011-12); and

Chair, Lawyer Representatives, District of Arizona (2008-09).

Pro Bono Legal Services

I believe it is important for lawyers in the private bar, particularly lawyers in large firms that are often well-resourced, to perform pro bono services for individuals who are indigent, or for organizations that serve the indigent or that provide legal services around issues of public concern. In the first part of my career, I was an associate and partner at the law firm of Jenner & Block. During each year I was at Jenner (1992-2001), it was recognized by The American Lawyer as one of the top ten pro bono firms in the United States, and it was recognized by The American Lawyer as the nation's leading pro bono firm in 1998. Our Firm had a requirement of 350 hours per year of nonbillable work, which pro bono work fulfilled. This was a distinctive commitment of the Firm of which we were all proud.

At Jenner, I accepted two appointments in the Seventh Circuit's pro bono program, arguing two appeals for indigents as a young associate, winning a reversal in one. The latter brought with it the opportunity to argue before Judges Richard Posner and Frank Easterbrook. I also tried my first case to a jury in federal district court in Chicago in 1999, Carroll v. DeTella. That case was brought by a prisoner who was allowed by a prison guard to be beaten unconscious with a pipe in retribution for the prisoner interrupting a conjugal visit planned for a gang chief

in the custody of the Illinois Department of Corrections. The jury awarded our client a modest amount of punitive damages in addition to compensatory damages for the assault. Carroll v. DeTella, 1999 WL 413475 (N.D. Ill. 1999).

After moving to Arizona, my pro bono practice continued. Soon after moving to Tucson, Dan McAuliffe and I represented the United States District Court for the District of Arizona at the request of Chief Judge McNamee when an out-of-Arizona lawyer, David Gallo, sued the District Court for amending its local rules to require out-of-state lawyers to appear pro hac vice, so that it could more effectively regulate their practice. Attorney Gallo complained, having previously been admitted to practice generally before the District of Arizona, that he had a constitutionally protected property interest in his right to continue to practice before the court, which had been improperly taken from him. We persuaded the Ninth Circuit otherwise. Gallo v. United States District Court, 349 F.3d 1169 (9th Cir. 2003).

My Arizona pro bono practice soon shifted toward leadership positions, as described below.

District of Arizona Pro Bono Program,
Founder and Coordinator (2006-2014)

When I became a lawyer representative to the United States District Court for the District of Arizona in 2006, I suggested to Chief Judge John Roll that the District Court might want to develop its own pro bono program, modeled on the Ninth Circuit's very successful program, which recruits volunteer counsel for potentially meritorious cases by allowing counsel (generally young associates at law firms) guaranteed oral arguments of their appeals. Chief Judge Roll enthusiastically agreed, and asked me for a series of letters to share with the full court planning the program and addressing potential issues and problems with it. After those communications, I was involved in meetings with the judges of the District of Arizona to continue developing the program under Chief Judge Roll's remarkable leadership.

I was the first coordinator of the program, and served continuously as a coordinator of it from 2007 until I resigned from a coordinator position in 2014, when my commitment to serving the state legal system deepened and broadened. As coordinator, I was responsible for the placement of approximately 70 cases with private counsel. Some were settled and at least three resulted in verdicts for plaintiffs, demonstrating that the cases (previously lacking counsel) were not meritless and undeserving of a hearing. This served to assist not only the indigent clients, but also the District Court itself, as it is besieged with an enormous number of pro se filings. In this regard, I became familiar in a manner more normal for judges than lawyers with the issues of managing a judicial system. I was invited to speak at a national conference of federal judicial employees charged with

addressing the crisis of pro se litigation and led and participated on a panel before the assembled federal personnel as an expert on program management. Founding this program with Chief Judge Roll, coordinating it, and placing so many cases through it, remains one of the proudest aspects of my legal career.

Lawyer-Coordinator, Ninth Circuit Pro Bono Program,
District of Arizona and District of Nevada (2007-present)

In 2007, I became the lawyer-coordinator of the Ninth Circuit's pro bono program for the Districts of Arizona and Nevada. My job there is to recruit and keep a list of volunteers, and upon the Court's request, to match cases provided by the Circuit with volunteers. During the past twelve years, I have placed over 140 such appeals with volunteer counsel, occasionally filling in myself where no volunteers can be recruited.

Lawyer-Coordinator, Arizona Court of Appeals Pro Bono Program,
Division Two (2014-present)

In 2014, Judge Thumma asked me to become a lawyer-coordinator for the Arizona Court of Appeals' pro bono program. As for the Ninth Circuit, my job there is to recruit and keep a list of volunteers, and upon the Court's request, to match cases provided by the Circuit with volunteers. During the past five years, there has not been a great need for the program in Division Two (it is more active in Division One), and I have helped place a couple of appeals for the Court of Appeals.

Pro Bono Representations

My pro bono service largely moved into the area of supervising. Young lawyers take appeals through the Ninth Circuit's pro bono program, and for years, I mentored and assisted them with their briefing and as they prepare for argument. I still sometimes took on individual pro bono cases, and also volunteered for the Maricopa County Volunteer Lawyers Program.

As one example of a case I handled myself, some years ago in Tucson, I took on the case of a client who was separated from her fiancée and thus needed to cancel a wedding reservation with a facility that took much of her family's limited resources. She had not been able to secure a refund from the wedding facility in Pima County, despite contractual provisions that entitled her to a refund.

We sued the wedding hosting business pro bono. Helpfully, the wedding chapel failed properly to defend, and we were able to generate a fee claim that exceeded the amount of the refund claimed. We then made a request for our fees when the defendant failed initially to appear, putting us to some motion practice. The judge of the Pima County Superior Court indicated that he would be inclined to grant us all of our fees. We then offered to waive all of our fees, contingent on

the facility entering into an agreement to return the funds (comprising much of a family's modest savings) to the client. The facility did so and the client received a full refund.

54. Describe the nature and dates of any relevant community or public service you have performed.

In Chicago, I was asked around the year 2000 to join the first Board of Directors of The Neo-Futurists, a largely improvisational theater company in the neighborhood where I then lived (Andersonville). I spent about a year working on the Board and believe I helped contribute to the Board's formation, function, and stability. The Neo-Futurists are still there and thriving, giving voice to further generations of Chicago performers.

Shortly after moving to Tucson, I was asked to get involved in the homeowners' association of the neighborhood in which we lived. I ended up serving a single one-year term as the President of the Trails End Improvement Association (2002-03). A few years later, I served a single term as the Secretary of the Association (2005-06).

From 2002 through 2005, I volunteered as a Board Member for Big Brothers Big Sisters of Tucson. I was a member of the Executive Board for almost all of that time and was the Chair of Board for the last six months in 2005. Throughout most of this time, the organization was increasing service levels in matching kids to mentors, under the leadership of its President and CEO, Freedom Kolb.

Looking for another opportunity to serve, in 2006, I joined the Board of Fellows for the Center for Creative Photography, a department of the University of Arizona that houses the works of several great American photographers, including Ansel Adams and Edward Weston. I soon concluded that, while I am a photographer and hobbyist, I was out of my depth and excused myself. From that point on, I have tried to concentrate my service activities within the legal profession, in the hope that I could be most impactful that way.

In 2018, our Phoenix neighborhood had a debate about the propriety of murals on neighborhood walls. Some in the community wanted the City of Phoenix to regulate murals. Some sought by calling in zoning complaints to cause residents to remove their murals. I attended a community meeting organized by the City of Phoenix at the Burton Barr Library in central Phoenix. I spoke in favor of the murals as a general matter and against regulating them. I worked before the meeting with others in the neighborhood who favored the murals, including advocates for the arts, to coordinate our communication at the meeting.

55. List any relevant professional or civic honors, prizes, awards or other forms of recognition you have received.

Member, American Law Institute (elected 2022);

Fellow, American Academy of Appellate Lawyers (inducted 2018);

2016 Member of the Year, Arizona State Bar (also awarded separately to two other members that year);

Fellow, Litigation Counsel of America (2015-2023);

Martindale-Hubbell AV rating, Preeminent and Outstanding Attorney (from 2007-2023);

SuperLawyers selectee 2012-2023, in business litigation from 2012-2016 and appellate litigation from 2017-2023;

Best Lawyers in America (2018-2023) selectee in appellate;

Arizona's Finest Lawyers, selectee;

Snell & Wilmer, Award for Special Service in Pro Bono (award not regularly given, given in recognition of leadership of pro bono committee and of increase in Firm's pro bono performance in that period);

Arizona State Bar, June 2018, Volunteer of the Month; and

Spirit of Philanthropy Award, by Association of Fundraising Professionals, 2005.

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates.

Judge, Arizona Court of Appeals, March 2023-present

Have you ever been removed or resigned from office before your term expired? **No.** If so, explain.

Have you voted in all general elections held during the last 10 years? **Yes.** If not, explain.

57. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

I love my family very much. My sons are 20 and 13, and I appreciate their performances of piano, guitar, or drums, appreciate doing astronomy, and taking them on family vacations to their favorite places that are very meaningful. This year, my younger son and I hiked three state highpoints (Arizona, New Mexico, and Oklahoma), and we have designs on Guadalupe Peak in Texas.

As far as personal interests, I staged a show of my would-be art photography at Criollo Latin Kitchen in Flagstaff in 2009, consisting half of Route 66 photography and half of pictures of roadside memorials. I spend a lot of time with my son who is interested in photography while he stages his own photos and take some of my own.

I have always read a great deal. I am an avid student of history – all phases of American history, history of the American Southwest, modern European history, ancient history, Native American history, Asian history, and Latin American history, among others. Last week I visited the grave of John Quincy Adams in the basement of a church in Quincy, Massachusetts. History aside, I also read a great deal of fiction, and am always looking for good new novelists.

I am a very high energy person, and stay active. I have run two marathons, and run five kilometers every day in Phoenix. I ran most days while living in Tucson, and while I miss the wilderness around our old west side neighborhood, I don't miss the periodic encounters with javelina.

I love to cook and make chile sauces and moles. They go great with holiday hams. Family time, hiking, reading, cooking, and running are all great releases from the stress of the world.

HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? **Yes.**

ADDITIONAL INFORMATION

59. The Arizona Constitution requires the Commission to consider the diversity of the state's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

As an out bisexual man, I believe I would, if appointed, be the first openly LGBTQ person to serve on the Arizona Supreme Court. That is a significant part of my identity. That said, we are all unique and have so many dimensions to us, and my life experiences have impacted me and built my understanding of others in ways that are too numerous to recount in a brief essay. I discuss some major ways below.

Growing up, my father worked for the Veterans Administration, processing benefits for all of our nation's veterans. When I was ten, he involved me in a bowling league with disabled veterans. That experience helped build my empathy and understanding for how these veterans lived their lives with their disabilities, and also their views of war, culture, and other matters. As a young adult, I was close to a Unitarian minister. I learned a great deal about comparative theology in that time, which broadened my understanding of the history and culture of others who were not like me (I was raised Catholic and wrote my undergraduate thesis on the Second Vatican Council).

Over the last twenty years, I have been part of a multiracial family and have two Asian sons, one of whom has had disturbing experiences of racial profiling, including being evicted from the lobby of my former law firm's office building by building security while waiting in public seating for me to come down to him and his mother. Racial profiling is chilling, and having it happen to my teenage son brought home how some populations face that with more frequency and force. It reminded me of how much work we have to do in our families, schools, and communities to build connections, understandings, and trust with others.

Some of my life experiences around the diversity of our state's population relevant to my application center on those I try to assist. As a law firm partner and now a judge, I have for two decades been heavily engaged in mentoring. I recruit clerks and externs at both state law schools, undergraduate law classes, from friends and former colleagues, and from the Latina Mentoring Project, the Arizona Asian-American Bar Association, one-n-ten, and Los Abogados. I have mentees of all stripes – women and men, liberal and conservative, churched and unchurched, people of all racial and ethnic backgrounds, straight and gay. Seeing their

professional aspirations and growth, but also their professional frustrations and difficulties, has helped me grow in empathy and understanding. On the positive side, I have learned lots from the different lived experiences of others who are not like me, and am still learning every day. On the negative side, I have seen assignments and recognition quietly avoid members of certain groups in unmistakable patterns. And I have heard people say the quiet part of sexism out loud, attacking lawyers as lacking commitment to the practice because they are working mothers, and attacking women leaders in overtly sexist ways. So there is much learned and much to celebrate in professional representation, but there is more work to do.

Pro bono has been a huge focus in my career, and it too helped me grow by building contact with a wide array of people in a wide array of circumstances. Most pro bono clients cannot afford lawyers. Sometimes they cannot afford air conditioning, or rent. Seeing moments in which our institutions will not respect someone's rights for lack of money, for lack of language skills, or for identity in a disfavored group, is very educational. Our courts must stand for justice for all and must provide favor to none. My pro bono experiences have driven home the importance of keeping the scales of justice balanced.

When I was on the Judicial Ethics Advisory Committee, we received an inquiry about whether a judicial officer could wear a "safe space" pin that culminated in Opinion 18-03. At first blush, it appeared that the answer would be a simple no – you cannot wear a safe space pin, as it reflects affinity with a group (there, the LGBTQ community). I spoke up and suggested that while I agreed with that conclusion, our Canons of Judicial Conduct (specifically, Canon 2.3(C)) teach that judges must not tolerate in court bias, prejudice, or harassment "based on attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation…". The Judicial Ethics Advisory Committee agreed, and gave that guidance in Opinion 18-03 – that none of those attributes are an acceptable basis in court for bias, prejudice, or harassment. That is a true diversity for all, and that is the diversity I have lived, learned from, and believe in as an Arizonan, and as an Arizona judge.

60. Provide any additional information relative to your qualifications you would like to bring to the Commission's attention.

None.

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? **Yes and yes.** If not, explain.

62. Attach a brief statement explaining why you are seeking this position.

Please see Attachment C, Personal Statement.

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Please see Attachment D, Writing Samples.

Writing Sample 1 is an excerpt from my Dissent in 3 SL Family, LLC v. State, Attachment D1 (pages 20-24 of the Dissent).

Writing Sample 2 is an excerpt from Skoglund v. Barbour, Attachment D2 (pages 7-11 of the Opinion)

64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally drafted. **Each writing sample should be no more than ten pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Please see Attachment E, Sample Opinions.

Opinion 1 is State v. Sidor, excerpted in Attachment E1.

Opinion 2 is Kirsten v. ADOT, provided in full in Attachment E2.

Opinion 3 is Gallery Community Ass'n v. K. Hovnanian at Gallery, LLC, provided in full in Attachment E3.

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews.

Though I am subject to judicial performance review, I have not yet received public data reports, nor have I been the subject of commission votes.

Attachment A to Application of Andrew Jacobs

Personnel Type	Person Name
Associate	Adams, Anna
Associate	Addy, Colton
Associate	Ahmed, Sharif
Associate	Alba, Ryan
Associate	Alexander, John
Associate	Alfandre, Joseph
Associate	Alires, Michael
Associate	Allender, Jada
Associate	Allred, Parker
Associate	Anand, Sarah
Associate	Anderson, Lester
Associate	Anderson, Ryan
Associate	Arakawa-Pamphilon, Skylar
Associate	Arnold, G. Travis
Associate	Astaphan, Aliya
Associate	Atwood, Travis
Associate	Barry, Christopher
Associate	Bates, Streator
Associate	Beal, Natalie
Associate	Bennett, Rory
Associate	Betor, Markie
Associate	Beverly-Graham, Kiah
Associate	Birtcher, Justin
Associate	Bolamperti, Anne
Associate	Bolding, Annie
Associate	Branby, Jacklyn
Associate	Breedlove, Haley
Associate	Brooks, Chance
Associate	Brown, Kenneth D.
Associate	Bujanda, Rubi
Associate	Burstein, Dylan
Associate	Buss, Roman
Associate	Busse, Emily
Associate	Cabrera, Michael
Associate	Calvanico, Mike
Associate	Cassidy, Delilah
Associate	Cassidy, Molly
Associate	Chastain, Audrey
Associate	Chen, Vivienne

Associate	Coggins, Riley
Associate	Colwell, Chase
Associate	Cooper, Blake
Associate	Cote, Samantha
Associate	Cotton, Marsha
Associate	Cummings, Hayley
Associate	Curley, Olivia
Associate	Dhalla, Aleem
Associate	Dixon, Creighton
Associate	Dubin, David
Associate	Dukes, Heather
Associate	Earl, Hayden
Associate	Eckert-Fong, Rebecca
Associate	Eddington, Tyler D.
Associate	Edelblute, David
Associate	Elliott, Rebekah
Associate	Emeterio, Michelle
Associate	Esber, Amelia
Associate	Eulano, Anthony
Associate	Eyman, Drew
Associate	Fernandez, Christian
Associate	Fierro, Cody
Associate	Fleming, Stephanie
Associate	Flint, Derek
Associate	Florentine, James
Associate	Flores, Alexis
Associate	Foley, Erik
Associate	Fortner, Tyler
Associate	Fowler, Mary Colleen
Associate	Fox, Alvaro
Associate	Fragoso, Jorge
Associate	Fuller, Brandon
Associate	Galan, Troy
Associate	Gallardo, Kristine
Associate	Gavin, Glenn
Associate	Gettel, Erin
Associate	Gilbert, Alysha
Associate	Gilbert, Carmen
Associate	Gillman, Farris
Associate	Goldstein, Helen
Associate	Gonzalez, Ciera
Associate	Grajeda, Hector
Associate	Green, Andrew
Associate	Greenup, Adam

Associate	Guerra, Theresa
Associate	Habib, John
Associate	Hafen, Sarah
Associate	Hall, Evan
Associate	Hancock, Bryan
Associate	Harmon, Jason
Associate	Heard, Kerry
Associate	Henderson, Katie
Associate	Hibbard, Sarah
Associate	Hicks, Morgan
Associate	Hilliard, Hayden
Associate	Hoffman, Trent
Associate	Hogan, Ryan
Associate	Housel, Nathaniel
Associate	Huah, Andrew
Associate	Hutchings, Michael
Associate	Inglese, Danny
Associate	Irvin, Mikayla
Associate	Ito, Robert
Associate	Jaussi, Taylor
Associate	Jensen, Michael
Associate	Johnson, Braden
Associate	Johnson, Lindsay
Associate	Johnson, Russ
Associate	Jones, Annika
Associate	Joyce, Ian
Associate	Jurayeva, Adiba
Associate	Jutzi, Christina
Associate	Kahn, Gil
Associate	Kazemi, Marissa
Associate	Kemper, Jessica
Associate	Kim, Dwight
Associate	Kim, Hyeon
Associate	Kizzie, Antonio
Associate	Kjartanson, Molly
Associate	Klomp, Wayne
Associate	Knobel, Clark
Associate	Krehbiel, Peter
Associate	Kurtela (Rawley), Hope
Associate	LaBarge, Christina
Associate	Labrum, Todd
Associate	Lapointe, Amberlee
Associate	Le, Jenna
Associate	Lee, Sarah

Associate	Leghorn, Foghorn R.
Associate	Leifried, Drake
Associate	Lichvar, Vinnie
Associate	Linde, Victoria
Associate	Ling, Irina
Associate	Liveoak, Faith
Associate	Lombardi, Ray
Associate	Longstaff, Aline
Associate	Luschei, Ashleigh
Associate	Lutz, Caroline
Associate	Lynn, Rachel
Associate	Maerowitz, Michael T
Associate	Manke, Amanda
Associate	Manley, Jordan
Associate	Manning, Jonathan
Associate	Manning, Scott
Associate	Marino, Anthony D.
Associate	Matloubian, Daniel
Associate	Matteoni, Kristen
Associate	McCausland, Stratton
Associate	McCourt, Abby
Associate	McManimon, Robert
Associate	Mecklenburg, Luke
Associate	Mello, Justin
Associate	Merdinger, Lauren
Associate	Meskey, Tait
Associate	Michaels, Elizabeth
Associate	Millea, Chase
Associate	Mills, Benjamin
Associate	Misuraca, Nicolas
Associate	Molison, Stacy
Associate	Morlock, Gabrielle
Associate	Motzkus, Rachael
Associate	Mousa, Amina
Associate	Munsell, Lauren
Associate	Nakamoto, Sarah
Associate	Nathe, Alexandra
Associate	Nessan, Katherine McKitterick
Associate	Ni, Yingchun
Associate	Nichols, Katherine
Associate	Nielson, Stephanie
Associate	Nordling, Caylye
Associate	O'Connor, Shane
Associate	Ogata, Christian

Associate	Olson, Dillon
Associate	Olson, Tracy
Associate	Ontiveros, Dana
Associate	Origel, Edgar
Associate	Overton, Kristen
Associate	Owens, Shannon
Associate	Ozuna, McKay
Associate	Pace, Abby
Associate	Paretti, Michael
Associate	Parker, Emily
Associate	Pepper, Adrian (AJ)
Associate	Pettit, Jordin
Associate	Pidcock, Courtney
Associate	Pillar, Shalayne
Associate	Pokorski, Kate
Associate	Pollock, Brad
Associate	Povinelli, Morgan
Associate	Prisbrey, Tyson
Associate	Pryor, Carissa L.
Associate	Puchalski, Jennifer
Associate	Pugel, Rachael
Associate	Pyatt, Caitlin
Associate	Raess, Simone
Associate	Rao, David
Associate	Reinke, Hanna
Associate	Repka, Ashley
Associate	Richter, Christian
Associate	Rioux, Stephanie
Associate	Roa, Sarah
Associate	Roberts, Paul
Associate	Robinson, Richard
Associate	Sadakane, Alexis
Associate	Salari, Alexa
Associate	Salge, Devon
Associate	Salmans, Kaitlyn
Associate	Sargsian, Zaven
Associate	Sass, Rachel
Associate	Satre, Mallory
Associate	Sawicka, Martyna
Associate	Scalo, Tim
Associate	Scheiferstein, Gregg
Associate	Scheiferstein, Paloma
Associate	Schiavoni, Vince
Associate	Schlagel, Cameron

Associate	Schroeder, Zachary
Associate	Seabolt, Daniel
Associate	Senn, Christopher
Associate	Shahidi, Soheila
Associate	Smith, Kelly
Associate	Smith, Nicole
Associate	Snow, James
Associate	Solorio, Chariese
Associate	Sonnenberg, Gregory
Associate	Soto Vazquez, Estefania
Associate	Speirs, Hannah
Associate	Staren, Daniel
Associate	Stedman, Claudia
Associate	Steel, Blake
Associate	Stienstra, Shaun
Associate	Still, Andrew
Associate	Stiteler, Casey
Associate	Sutton, Jonathan
Associate	Sutton, Lewis
Associate	Talkington, Lauren
Associate	Teleoglou, Joe
Associate	Terriquez, Alexix
Associate	Thomas, Tyler
Associate	Thorpe, Brett
Associate	Thurston, Glen
Associate	Tighe, Patrick
Associate	To, Kimvi
Associate	Turner, Caley
Associate	Ustundag, Jon
Associate	Valev, Ilian
Associate	Van Ranken, Jessica
Associate	Venezia, Allison
Associate	Venzor, Victoria
Associate	Walther, Eric
Associate	Warner, Charlene
Associate	Washington, Michele
Associate	Weaver, Amanda
Associate	Webb, Mark
Associate	Wendl, Alexis
Associate	Wesson, Sam
Associate	White, Caitlin
Associate	Wiberg, Ashley
Associate	Wilhelmsen, David
Associate	Williams, Kennedy

Associate	Wirthlin, John
Associate	Wiseman, Scott
Associate	Wolcott, Brenna
Associate	Wolf, Tyler
Associate	Young, Nick
Associate	Zambrano, Diamond
Associate	Zona, Lynsie
Associate	Zurcher, Kathryn
Attorney	Barnard, Catherine
Attorney	Baughman, Kristin
Attorney	Bosch, Chris
Attorney	Duffy, Shaun
Attorney	Greene Apking, April
Attorney	Hale, Allison Brown
Attorney	Harman, Benjamin
Attorney	Ivey, Ryan
Attorney	King, David
Attorney	Parish, Lee
Attorney	Waterman, Melinda D.
Attorney	Weber, Colby
Counsel	Ackerman, Daniel
Counsel	Adams, Katharine
Counsel	Allen, James P.
Counsel	Bans, Allison
Counsel	Behnood, Sasan
Counsel	Breedlove, Fred
Counsel	Brereton, Elizabeth
Counsel	Breyfogle, Ross
Counsel	Burnside, John
Counsel	Douglas, Ian
Counsel	Duncan, Brad
Counsel	Dwyer, Anne
Counsel	Esposito, Kathleen
Counsel	Fitzgerald, Jonathan
Counsel	Ford, Michael
Counsel	Franich, Christopher
Counsel	Gallup, Taryn
Counsel	Gilbert, Graham
Counsel	Goldstein, Kelly A.
Counsel	Graca, Gary
Counsel	Graves, Kyle W.
Counsel	Grumbling, Matthew
Counsel	Gunnerson, Geoffrey L.
Counsel	Hager, Laurie

Counsel	Hawes, Andrew
Counsel	Hicks, Andrea
Counsel	Hua, Jing (Jenny)
Counsel	Ibok, Imeabasi
Counsel	Jetter, Jay
Counsel	Johnson, James
Counsel	Jones, Jacob
Counsel	Kanute, Nathaniel G.
Counsel	Kelly, Julie
Counsel	Keyser, Emma
Counsel	Krishnan, Aditya
Counsel	Larsen, Paul
Counsel	Leach, Erin
Counsel	Lembke, Kent
Counsel	Manning, Russell
Counsel	McCaig, Katherine Annuschat
Counsel	McCann, Susan
Counsel	McOmber, Elisabeth
Counsel	Movido, Magnolia
Counsel	Pappalardo, Paul A.
Counsel	Pavluk, Serge
Counsel	Petrelli, Morgan T.
Counsel	Quigley, Julie
Counsel	Regula, Ryan
Counsel	Rinner, Todd
Counsel	Rozier, Matt
Counsel	Rudys, Raminta
Counsel	Schneider, Lea
Counsel	Seo, Byeongsook
Counsel	Smith, Timothy A.
Counsel	Steffen, Jeffrey
Counsel	Stutman, Erica J.
Counsel	Sutton, Rosalyn
Counsel	Thomsen, Dallas
Counsel	Thornton, Travis
Counsel	Vaughn, Lynn
Counsel	Vernon, Eileen
Counsel	Yaron, Emily
Counsel	Young, Stephen
Of Counsel	Angel, Michael
Of Counsel	Bates, Robert
Of Counsel	Burton, Tom
Of Counsel	Campbell, Nancy
Of Counsel	Carmody, Sheila

Of Counsel	Cohen, Jon
Of Counsel	Cohen, Roger C.
Of Counsel	Condo, James
Of Counsel	Curtis, Patricia J.
Of Counsel	Drake, Curtis J.
Of Counsel	Frost, Daniel R.
Of Counsel	Gess, Albin
Of Counsel	Giancola, Paul
Of Counsel	Halpern, Barry
Of Counsel	Hayden, William
Of Counsel	Hoecker, Thomas
Of Counsel	Hoxie, Joel
Of Counsel	Ikegami, Cheryl
Of Counsel	Joseph, Christy
Of Counsel	Kinas, Robert R.
Of Counsel	Klein, Mitchell
Of Counsel	Lagerman, Lars
Of Counsel	Lajoie, Judith
Of Counsel	Leach, Sid
Of Counsel	Leta, David E.
Of Counsel	Lindsay, Michael
Of Counsel	Mallery, Richard
Of Counsel	Mills, Creighton
Of Counsel	Moore, Randolph T.
Of Counsel	Morales, Gerard
Of Counsel	Ohre, Mark
Of Counsel	Parker, Kevin
Of Counsel	Platt, Warren
Of Counsel	Price, Joseph
Of Counsel	Rathwell, Peter
Of Counsel	Robertson, John A
Of Counsel	Simon, Marc G.
Of Counsel	Sprentall, David
Of Counsel	Sullivan, Alan L.
Of Counsel	Wiley, Jay
Of Counsel	Willis, Jeff
Of Counsel	Yoken, Stephen
Partner	Adams, Joseph G.
Partner	Ahler, Colin
Partner	Alvarez, Dax
Partner	Andrews, Cortland P.
Partner	Andrews, John
Partner	Aramburu, Troy J.
Partner	Ashcraft, Damon

Partner	Ashton, Kenneth
Partner	Assayag, Michele
Partner	Austin, Bradley T.
Partner	Bagley, Marcus
Partner	Baker, Michael
Partner	Barker, David G.
Partner	Bayley, Christopher H.
Partner	Beck, Jeffrey
Partner	Bivens, Donald
Partner	Blaylock, Brian
Partner	Bohman, V.R.
Partner	Bouchard, Jenna
Partner	Bourke, Cody
Partner	Braddock, Cory L.
Partner	Bright, Christopher
Partner	Brinkley, Jason
Partner	Brinson, Jonathan G.
Partner	Brosnan, Tiffanny
Partner	Brown, Kevin
Partner	Brown, Lawrence
Partner	Brum, Patricia
Partner	Budge, Wade R.
Partner	Burke, Brian W.
Partner	Burt, Brian J.
Partner	Byrne, Patrick G.
Partner	Caldwell, Anthony
Partner	Carucci, Anthony
Partner	Casson Owen, Jill
Partner	Casteel, Stephanie
Partner	Catero, Jennifer Hadley
Partner	Chakravarty, Aloke
Partner	Chiarello, Matthew
Partner	Choi, Jaime
Partner	Choi, Laurie
Partner	Clark, David
Partner	Clarke, Robert
Partner	Colyer, Christopher Philip
Partner	Crawford, Vaughn
Partner	Crowson, Walker
Partner	Cunningham, Brian D.
Partner	Currie, Marc R.
Partner	Cutler, Cameron
Partner	Dabney, John
Partner	Daly, Kelly

Partner	Dance, Timothy J.
Partner	Davidson, Clifford
Partner	Davis, Allison
Partner	Davis, Dawn
Partner	Davis, Nathan K.
Partner	Dawson, Barbara J.
Partner	Delikanakis, John S.
Partner	Derstine, J. Matthew
Partner	Donahey, Michael
Partner	Donovan, Matthew Kelly
Partner	Dove, Kelly H.
Partner	Dragoo, Denise
Partner	Duffy, Joshua
Partner	Ebe, Jason
Partner	Erickson, Richard Gray
Partner	Evans, Bret
Partner	Evensen, Elizabeth
Partner	Fahrendorf, Christopher M.
Partner	Farr, Douglas P.
Partner	Feeney, Matthew
Partner	Feinberg, Robert
Partner	Fischer, Matthew
Partner	Flior, Andrew Sterling
Partner	Foster, Brian
Partner	Foster, Mark
Partner	Fowler, Patrick
Partner	Fowler, Tracy
Partner	Fraley, Robert Lee
Partner	Frank, Jonathan E.
Partner	Freaner, Carlos
Partner	Fugazzi, Alex L.
Partner	Gaffney, Don
Partner	Gautam, Gregory Rajeev
Partner	Gehret, Michael A.
Partner	Gianelloni, Charles E.
Partner	Gordon, Richard C.
Partner	Grad, Roger
Partner	Graham, Steve
Partner	Gregory, Keith M.
Partner	Griffith, Blakeley E.
Partner	Gubernick, Deborah
Partner	Hafen, Steffi
Partner	Halaby, Andrew
Partner	Hallerman, Mary

Partner	Hancock, Scott
Partner	Hansen, David
Partner	Hauff, Jr, Charles F.
Partner	Henry, Robert A.
Partner	Henson, Courtney L.
Partner	Hermes, Ed
Partner	Heyman, Raymond
Partner	Higgins, Colin R.
Partner	Hogan, Marshall
Partner	Hulse, Dominic M.
Partner	Hulse, William Brian
Partner	Ippolito, Tony
Partner	Jacobs, Andrew M.
Partner	Jarvey, Matthew L.
Partner	Jenson, Craig
Partner	Jerome, Steven D.
Partner	Johnson, Brett W.
Partner	Jones, Cary D.
Partner	Jones, James H.
Partner	Jones, Todd
Partner	Kanan, Stephanie
Partner	Kanefield, Joseph
Partner	Kastin, William A.
Partner	Kay, Timothy
Partner	Keller, Charles P.
Partner	Kelly, Patrick W.
Partner	Kethcart, Robert
Partner	Kilroy, James
Partner	Kim, Richard
Partner	King, Tony T.
Partner	Kintner, Eric
Partner	Knauer, Ivan
Partner	Kobeissi, Sarah
Partner	Konrad, Mark E.
Partner	Konsdorf, Ryan D.
Partner	Kotter, Jonathan
Partner	Kroeger, Joseph A.
Partner	Lalli, Matthew L.
Partner	Lang, Adam E.
Partner	Langton, Grant
Partner	Lashbrook, Monique
Partner	Le, Chuong
Partner	Lockwood, Ellie
Partner	Logsdon, Craig A.

Partner	Lomax, John F.
Partner	Lowry, Carlene Y.
Partner	Lundell, Todd E.
Partner	Mahoney, Daniel M.
Partner	Marshall, Gregory
Partner	Martin, Donald
Partner	Martin, Jeffrey A.
Partner	Martorana, Bradley
Partner	Mauss, Byron
Partner	Melendres, James
Partner	Merrill, Anthony
Partner	Merrill, Brad W.
Partner	Meyer, Anne
Partner	Miller, Gina
Partner	Miller, Kade
Partner	Mills, Brian J.
Partner	Miskell, Robin
Partner	Moayedi, Bardia
Partner	Mooradian, Alina
Partner	Morgan, Bryce
Partner	Morris, Mark O.
Partner	Morton, Jeff
Partner	Mulholland, William F.
Partner	Narducci, Lucas
Partner	Naylor, Benjamin
Partner	Nicholson, Bradley
Partner	Nigro, David P.
Partner	Nucci, Benjamin
Partner	O'Hare, William
Partner	O'Loughlin, Craig
Partner	Olson, Bob
Partner	O'Neill, Timothy
Partner	Page, Bart
Partner	Partington, Joshua
Partner	Patten, Michael
Partner	Paul, Patrick
Partner	Pearson, Lindsay J.
Partner	Peay, Stewart O.
Partner	Perez, Angela
Partner	Perrella, Jill H.
Partner	Peterson, William E.
Partner	Pezold, Eric S.
Partner	Pidcock, Andrew
Partner	Pillote, Cynthia

Partner	Platt, John
Partner	Pohl, Prescott
Partner	Pokorski, Jody
Partner	Poorten III, William
Partner	Porter, Jeffrey S.
Partner	Powell, Mark
Partner	Prior, Paul Swenson
Partner	Privette, Howard
Partner	Prupas, Janine C.
Partner	Ranade, Amit
Partner	Rataezyk, Joshua
Partner	Reed, R. Steven
Partner	Reeves, Benjamin W.
Partner	Refo, Patricia L.
Partner	Reimann, Curt
Partner	Reynolds, Michael
Partner	Ricks, Ryan Dale
Partner	Rodman, Daniel S.
Partner	Roehm III, Victor J.
Partner	Rogers, David E.
Partner	Roman, Terry M.
Partner	Rufer, Brett J.
Partner	Sarhangian, Byron
Partner	Scheinkman, James J.
Partner	Schippel, Bahar A.
Partner	Schneiderman, Joshua
Partner	Schultz, Marc L.
Partner	Scudder, Jeffrey
Partner	Shakespear, Paul W.
Partner	Shavinsky, Mandy S.
Partner	Sherlock, Sean M.
Partner	Sienicki, James
Partner	Simon, Rachel A.
Partner	Singletary, Jeffrey M.
Partner	Sobelman, Howard
Partner	Sorensen, Rose
Partner	Sorenson, Amy F.
Partner	Spencer, Eric
Partner	Staudenmaier, Heidi
Partner	Staudenmaier, William
Partner	Stevens, Garth D.
Partner	Stewart, Jeremy J.
Partner	Sugich, Carlos A.
Partner	Suzuki, Bryce

Partner	Swift, Marvin S.
Partner	Thomas, Lowell
Partner	Thompson, Sunny
Partner	Tovrea, Carlie
Partner	Tuttle, Jeff
Partner	Vakil, Ketan S.
Partner	Van Houten, Sara
Partner	Veliz, Roxanne
Partner	Vryhof, John C.
Partner	Wahlquist, Becca
Partner	Walton, Kevin
Partner	Weiss Jr, David E.
Partner	Welch, Ben
Partner	Weldon, Elizabeth
Partner	Weston, John
Partner	Williams, Craig
Partner	Williams, David P.
Partner	Williams, L. Frederick
Partner	Winter, Ralph
Partner	Winterscheidt, Rebecca
Partner	Wittenberg, Daniel
Partner	Wood, Nicholas J.
Partner	Woodard, Joshua
Partner	Wright, Joyce
Partner	Wright, Kevin
Partner	Wurster, April
Partner	Wylie, Elizabeth
Partner	Yee, Jennifer
Partner	Yu, Jason
Partner	Zapata-Rossa, Marian
Partner	Zen, Kevin
Partner	Ziemba, Mark A.
Senior Attorney	Bennett, Michael
Senior Attorney	Cheong, Holly E.
Senior Attorney	Crist, David
Senior Attorney	Cunningham, Susan
Senior Attorney	Farmer, James
Senior Attorney	Fulstone, Suellen
Senior Attorney	Goodrich, Rebecca
Senior Attorney	Hoecker, Ellen
Senior Attorney	La, Eva
Senior Attorney	Lewis, Tanya
Senior Attorney	Lustig, Jennifer
Senior Attorney	Redstone, Laura

Senior Attorney	Robinson, Cindy
Senior Attorney	Roper, Brandon
Senior Attorney	Sohn, Jeanne
Senior Attorney	Torp, Lyndsey Ann
Senior Attorney	Vatanparast, Roxana
Senior Attorney	Wilson, Margaret

Attachment B to Application of Andrew Jacobs

Judges of Division One

Cynthia J. Bailey
Michael J. Brown
Jennifer B. Campbell
Michael S. Catlett
Kent E. Cattani
Maria Elena Cruz
Anni Hill Foster
Brian Y. Furuya
David B. Gass
Randall M. Howe
Daniel J. Kiley
Paul J. McMurdie
James B. Morse, Jr.
Angela K. Paton
Jennifer M. Perkins
Samuel Anderson Thumma
David D. Weinzweig
D. Steven Williams

Judges of Division Two

Sean E. Brearcliffe
Peter J. Eckerstrom
Karl C. Eppich
Lacey Stover Gard
Michael F. Kelly
Christopher J. O'Neil
Jeffrey L. Sklar
Christopher P. Staring
Garye L. Vásquez

Attachment C – Personal Statement

I have studied and appeared before appellate courts for my entire professional life, before spending the last nineteen months serving on one. I care deeply for Arizona's state courts and the rule of law. To be a good Justice of the Arizona Supreme Court, one has to possess many different qualities. I am applying because I believe I have those qualities, and could serve the Court and our state effectively as a Justice. I'm grateful for this opportunity to briefly explain why.

First, a Justice of our Supreme Court must have excellent writing and analytic skills. Justices must shed light in every corner of our law, and must do so lucidly and clearly, so Arizona's courts will have clear direction, and so the other branches of our government and Arizonans themselves can read and understand the court's guidance. I believe my judicial work product shows I am ready to write opinions about difficult and complex subjects that are readily useful to both specialized and general readers. Because our hardest and most intractable problems can wind up in our Supreme Court for final resolution, it is also imperative that Justices have a record of truly outstanding analytic skills. I believe my work in cases like *Gallery Community Association v. K. Hovnanian at Gallery, LLC* and *3 SL Family, LLC v. State* shows that I am ready to help resolve our state's most complex legal issues. I am grateful for my colleagues who support my application and who agree I am ready to do so.

Second, while we want the best possible writing and analysis from a Justice, strong intellect alone cannot make a good Justice. You need judgment. I believe my career has prepared me well for the difficult tasks of judgment in our Supreme Court. Justices need judgment about what issues to decide and what issues not to decide; whether to touch issues lightly or resolve them squarely; and which cases to take and which not, across areas as disparate as civil, criminal, family, juvenile, tax, probate, workers' compensation, and unemployment benefits. My experience on the Court of Appeals, and three decades of appellate advocacy in complex matters, have helped me understand the nuances of judgment available to a reviewing court. My time on the bench has given me crucial practice making those judgments. Having argued sixty civil appeals, and now having decided many, I believe I am very well-prepared for the difficult tasks in judgment that reach our Supreme Court.

Substantive legal judgment aside, Justices need judgment in their dealings with fellow Justices; in how they write and communicate with colleagues in the Court of Appeals, the Superior Court, the Justice Court and other courts; and in how they approach a host of administrative and leadership tasks. A Justice's judgment must be in service of Arizona – whether in justly resolving lawyer disciplinary issues before the Court, providing guidance to the judicial or lawyer ethics processes, considering how to improve access to justice for everyone in Arizona, or weighing the rules that impact how we choose jurors. My breadth of experience has helped me grow in judgment. I believe I am ready now to serve, if I am fortunate enough to be chosen.

Third, a Justice is not only one of seven who decide cases. A Justice is also one of a group of seven who, under the leadership of the Chief Justice, help run Arizona's judiciary. To share in that great responsibility, one should be steeped in what the state courts are, and all of the functions they perform, over a long period. My service on six Supreme Court commissions over fifteen years – concerning judicial ethics, judicial performance, the rules of civil procedure, jury service, and special action procedures – has given me invaluable training in what our Supreme Court does, so I can do that work, and also help others in doing it.

Moreover, Justices need administrative and leadership skills. They head trial court appointments commissions; help manage the substantive processes over which the Supreme Court presides, which (among other things) concern judicial ethics, lawyer discipline, the rules of evidence, and admission to practice; and lead Supreme Court task forces on special issues. Founding a pro bono program, leading the Civil Practice and Procedure Committee of the State Bar, helping lead peremptory strike reform, and leading the Ninth Circuit lawyer representatives shows that I have the kind of management skills that would allow me to serve well as a Justice. In particular, chairing the Civil Practice and Procedure Committee for four years would help me as a Justice. That committee has roughly forty members, many of whom are experienced trial and appellate judges. Leading it through a contentious period of revising many of the major sets of court rules – subjects on which these large, successful personalities had strong and often conflicting views – was a great challenge. I believe meeting that challenge and finding ways to reach consensus and thoughtfully discuss difficult issues helped prepare me to be part of a group of leaders and thinkers like our Supreme Court.

Fourth, a Justice needs to understand that every case we decide, and every future case guided by the cases we decide, has important impacts on people. That principle standing alone does not decide any case, but every decision in every case must be informed by that awareness. When our courts sever parental rights, determine the length of a criminal sentence, decide whether a crime victim may be heard, determine whether a company must pay damages, or decide whether an injured worker is entitled to compensation, there are vital human interests at stake on all sides. How we speak is crucial to those before us that day, and to those who are guided by what we write. My judicial work is always informed by that important understanding – whether in juvenile, family, criminal, civil, mental health, or other matters. I start with text and follow the text, but I understand that law is not math. It is an art and not a science. Thirty years of representing real people, and often representing disenfranchised people, or people without resources, matters. To be fair and impartial, one must see the felt impact of our work, see the dignity and importance of everyone before the court, wish to explain in a fair, respectful and dignified way what the law says about their case, and care. I care very deeply that we provide the best and most dignified justice to all. Thanks for your consideration.

Attachment D1

Excerpt from Dissent,
3 SL Family, LLC v. State
(pages 20-24)

"the instruction preceding kindergarten provided to individuals three to five years old through a . . . private school," the Department found all three applicants eligible to receive a license. The Department reasoned that because the preschools were childcare facilities, they were not also schools. The Department employed random selection and awarded the DRC to "Successful Applicant," whose proposed location was within 500 feet of both preschools.

E. 3SL Sues, and Summary Judgment Practice Shows the Preschools Were Nonpublic Institutions Where Instruction Was Imparted When the Department Awarded the DRC.

¶62 On December 28, 2016, 3SL brought this action by filing a special action complaint in superior court, alleging that it was wrongfully deprived of a chance to participate in the lottery to obtain the DRC at issue, given the preschools located near the Successful Applicant. On May 26, 2020, 3SL moved for summary judgment on its claim for declaratory judgment. On August 13, 2020, the superior court entered summary judgment for 3SL, finding that the Department's failure to exclude the successful applicant from the lottery was arbitrary and capricious because its proposed location was less than 500 feet from the two preschools.

¶63 The summary judgment record demonstrated that the preschools imparted instruction. Ahwatukee Preschool's primary goals as outlined in the Parent Handbook are "[t]o provide quality education at a reasonable cost . . . to reinforce . . . learn[ing] through play, experience, and discovery . . . [and] [t]o introduce parents to the world of early childhood education." The preschool has nine teachers, a director, administrative staff, and a nurse on campus. Teachers are required to have a bachelor's degree with a preference in "early childhood education" or have a certificate in teaching. Ahwatukee Preschool's curriculum is STEM-oriented and focuses on science, technology, engineering, and math, as well as reading and writing. The curriculum also focuses on fine motor skills, large motor skills, cognitive, social, and emotional development. Report cards on each student's progress are sent to parents. Ahwatukee Preschool also operates on a schedule that is synchronized with the local school district and offers no summer programs.

¶64 Grace Garden describes itself as "[a]n Early Childhood Educational facility. . . that balances learning through play and structure" on its website. Grace Garden participates in Arizona's First Things First Program, which bases its curriculum on the Arizona Early Learning Development Guidelines and Arizona's Infant and Toddler Development Guidelines. Grace Garden creates weekly lesson plans that include reading

and writing, art, physical activity, and science. Further, Grace Garden provides parents with report cards that monitor a child's educational and physical development. Grace Garden also holds parent-teacher conferences.

¶65 These facts were not disputed in the superior court and are not (and cannot be) disputed on appeal. The Department's argument on this subject remains that it is undisputed that the preschools are also licensed as child-care facilities, making it impossible for them to be schools as a matter of law. As explained below, that argument fails under the Act.

DISCUSSION

I. Preschools Are Schools Under the Act's Plain Language.

¶66 We analyze the Act's plain language to construe the Act's two provisions concerning schools. *See Ariz. Advoc. Network Found. v. State*, 250 Ariz. 109, 114 ¶ 19 (App. 2020). The majority is right that our primary objective in interpreting a voter-enacted law is to effectuate the voters' intent. *Ariz. Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 323-24 ¶ 11 (2014). As we noted when interpreting the Act, we give "terms their ordinary and commonly accepted meaning, unless the [voters] have provided a specific definition." *JH2K I*, 246 Ariz. at 310 ¶ 9. If there is more than one possible reasonable interpretation of a statute, we look to "secondary interpretation methods, including the statute's subject matter, historical background, effects and consequences, as well as its spirit and purpose" to interpret it. *In re Drummond*, ___ Ariz. ___, 543 P.3d 1022, 1025 ¶ 5 (2024). Helpful here, Arizona courts often look to dictionaries to determine ordinary and commonly accepted meanings of terms undefined in statutes. *See Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 515 ¶ 20 (2021); *State v. Clow*, 242 Ariz. 68, 71 ¶ 13 (App. 2017).

A. The Plain Language of the Act Makes Clear That a Preschool in Section 2802(B) Is Also a School in Section 2804(B), So Marijuana Cannot Be Grown or Dispensed Near Preschools, Just Like the Other Schools in Section 2802(B).

¶67 The Act contains two provisions that operate to separate children from the growth, dispensing, and use of medical marijuana, and thus to protect sellers and users of medical marijuana: Sections 2802(B) and 2804(B). Our law requires us to read these provisions together and in harmony. *Albert L. v. Dep't of Child Safety*, 253 Ariz. 146, 149 ¶ 13 (App. 2022) (stating courts "seek to harmonize and attain consistency among related statutory provisions in the context of the overall statutory scheme")

(citation omitted); *see Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017) ("Words in statutes should be read in context in determining their meaning."). When we do, their meaning is clear.

¶68 The first provision, Section 2802, states that the Act did not legalize "[p]ossessing or engaging in the medical use of marijuana . . . [o]n the grounds of any preschool or primary or secondary school." A.R.S. § 2802(B)(2). Indeed, Section 2802 invited the legislature to impose criminal penalties for that conduct, which it soon did. *See* A.R.S. § 15-108(B) (prohibiting "possess[ion] or use [of] marijuana on the campus of any high school, junior high school, middle school, common school, or preschool"). Meanwhile, the second provision, Section 2804, bars the state from siting a medical marijuana dispensary "within five hundred feet of a public or private school" predating the Act. A.R.S. § 36-2804(B)(1)(b)(ii). Taken together, the plain language of Sections 2802 and 2804 show preschools are schools, for many reasons.

¶69 *First*, both separate schoolchildren from marijuana sale and use, in service of the Act's goals of "protect[ing] patients . . . from arrest and prosecution . . . if such patients engage in the medical use of marijuana." Prop. 203, § 2.G. It would make no sense for the same drafting hand to separate preschoolers, grade schoolers, and high schoolers from marijuana in Section 2802(B) – only to allow the placement of dispensaries next to preschoolers in Section 2804(B) while separating them only from older schoolchildren. *See State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 244 ¶ 21 (2020) ("If the provision has only one reasonable interpretation, we apply it.") (citation omitted).

¶70 *Second*, the siting prohibition in Section 2804(B) is categorical, keeping dispensaries away from all schools – e.g., "public or private school[s]." A.R.S. § 36-2804(B). Even if one reads "public or private school" to beg the question of whether preschool is a school, that sends you back to Section 2802(B)(2), which shows the Act treating preschoolers as on par with grade schoolers and high schoolers in enforcing separation between them and marijuana dispensaries.

¶71 *Third*, Section 2802(B)(2) treats schoolchildren as one conceptual group: those enrolled in "preschool or primary or secondary school." A.R.S. § 36-2802(B). This was not a dry definitional exercise. It kept marijuana away from kids, and vice versa. That's why the adjacent Section 2802(B)(1) listed "[o]n a school bus" as another no-marijuana zone. Section 2804 surely addresses the same universe of children separated from medical marijuana by keeping dispensaries away from all public and private schools. *Albert L.*, 253 Ariz. at 149 ¶ 13 (requiring us to "seek to

harmonize and attain consistency among related statutory provisions in the context of the overall statutory scheme").

B. Our Decision in *JH2K I* Reinforces That the Plain Meaning of "Preschool" in Section 2802(B) Is a Type of "School."

¶72 *JH2K I* should guide our plain meaning analysis and lead us to affirm. *See JH2K I*, 246 Ariz. at 311-12 ¶ 17. There, we analyzed whether the Department abused its discretion by including schoolgrounds within the definition of "school." *Id.* at 310-12 ¶¶ 10-17. We analyzed Section 2802's authorization of penalties for the possession or use of medical marijuana "[o]n the grounds of any preschool or primary or secondary school." *Id.* at 311 ¶ 17 (cleaned up). We explained that Section 2802(B)'s language had an obvious import: "that provision shows that the voters' intent was plain: to prevent schoolchildren from exposure to marijuana." *Id.* We thus made clear that "preschool or primary or secondary school[s]" in Section 2802(B) all contain "schoolchildren." *Id. JH2K I* treats "preschool" as of a piece with "primary or secondary school."

¶73 Demonstrating the lack of ambiguity in the Act, we did not use secondary interpretive tools to parse Section 2802(B) in *JH2K I*. This shows we found Section 2802(B) unambiguous in treating "preschool" as a type of "school" containing "schoolchildren." *See Fuentes v. Fuentes*, 209 Ariz. 51, 55 ¶ 12 (App. 2004) ("[W]hen the statutory language is clear and unambiguous, a court need not and should not resort to secondary rules of statutory construction."); *Chaparral Dev. v. RMED Int'l, Inc.*, 170 Ariz. 309, 311 (App. 1991) ("Our first duty in interpreting a statute is to determine and give effect to the legislature's intent, and the first place to look is the wording of the statute. If the language is plain and unambiguous, then no construction is necessary and our duty is simply to apply that plain and unambiguous language."). So it should be here – we should resolve the question with reference to the plain meanings of Section 2802 and 2804.

¶74 The majority's turn away from plain meaning creates a deeper inconsistency between today's decision and *JH2K I*. We already explained in *JH2K I* that Section 2802's "preschool or primary or secondary school[s]" are those protected by Section 2804's spatial buffer. 246 Ariz. at 312 ¶ 17. While stressing that schools extend to their property's edge (and not just the school building on that property), we gave effect to Section 2802's plain intent "to prevent schoolchildren from exposure to marijuana," stating it would be "contrary to that intent" if "a dispensary could theoretically operate directly adjacent to school grounds" – without the buffer Section 2804 requires between schools and dispensaries. *Id.* Yet that is precisely the result the Department achieves today – siting a dispensary literally

adjacent to a type of school listed in Section 2802, which we warned in *JH2K I* was "contrary to" the voters' intent in the Act. *Id.*

¶75 The majority's answer to this is wholly unpersuasive. It asserts that the dissent misconceives the voters' intent as separating schoolchildren from marijuana, when the Act's real intent is to keep medical marijuana users from prosecution. *See* Paragraph 42, *supra (*"[W]e do not, as the dissent does, rely on an inferred intent beyond the Act's express purpose.") This is a false inconsistency. Separating schoolchildren from medical marijuana growing, sale, and use *is one means the voters chose to protect marijuana growers, sellers, and users from prosecution*. *Compare* Prop. 203, § 2.G. (stating goals of avoiding prosecution for dispensers and users of medical marijuana) *with* A.R.S. § 36-2802(B)(2) *and* A.R.S. § 36-2804(B) (separating medical marijuana use and sale from schoolchildren). The intent the majority identifies is the same intent effectuated by the dissent's closer reading of the same statute. This is necessarily consistent with the concurrence in *Arizona Department of Revenue v. Tunkey* the majority cites, which emphasized four justices' view that "the words of a statute . . . are not 'evidence' of anything. They are the law." 254 Ariz. 432, 437 ¶ 26 (2023) (Bolick, J., concurring, joined by Beene, Montgomery, and King, JJ.) (cleaned up). The Act's language and design, which separate schoolchildren from marijuana, demonstrates the voters' intent to do what that very language says. We should follow *JH2K I*, read these sections together to give effect to the voters' intent, and affirm.

C. Dictionaries Refute the Department's and the Majority's Approach, Defining "Preschool" as a "School."

¶76 The majority asserts in Paragraph 16 that preschools are not schools, without citing any case law that says so. While *JH2K I* stands against the majority's unsupported approach, so do dictionaries, including the dictionary the Department cited to this court.

¶77 The Merriam-Webster Dictionary defines the noun "preschool" as "a school for children usually younger than those attending elementary school or kindergarten." *Preschool*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/preschool (last visited September 24, 2024).[3] While we do not have an official or preferred

[3] The Department cites one of Merriam-Webster's two definitions of "preschool" in its argument that "preschool" is not a "school," even though Merriam-Webster supports 3SL's position. The Department sows confusion by suggesting this dictionary does not provide a clear answer to

dictionary, Arizona courts often cite this version of the Merriam-Webster Dictionary when analyzing the plain meaning of statutes. *See*, *e.g.*, *State ex rel. Brnovich*, 249 Ariz. at 244 ¶¶ 21, 22; *City of Phoenix v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 239 ¶¶ 14, 18 (2019). The Oxford Advanced American Dictionary agrees with Merriam-Webster, defining "preschool" as "a school for children between the ages of about two and five." *Preschool*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearnersdictionaries.com/us/definition/english/preschool?q=preschool (last visited September 24, 2024).

¶78 Were there one, the majority could seek to cite a dictionary definition allowing that preschools are either schools or nurseries for children two or three years through five years old. *See Preschool*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/preschool (last visited September 24, 2024) (defining "preschool" as "a school or nursery for preschool children"). But that would refute the majority's analysis just as squarely, because the majority, like the Department, does not dispute that *these particular* preschools provide instruction to children of preschool age. To be correct, the majority needs the answer to be that preschools *can never be* "schools," and that is neither colloquially accurate nor consistent with the record of this case. Plain meaning dictates the opposite reading of A.R.S. § 36-2802(B) – "preschool" in the Act is a "school."

¶79 The majority's response that *In re Drummond*, ___ Ariz. ___, 543 P.3d 1022 (2024) excuses it from considering or refuting dictionary definitions reinforcing the statutes' plain meaning of "preschool" is wrong for several reasons.

¶80 *First*, the Arizona Supreme Court in *In re Drummond* approved the use of dictionaries in a case like this one: "[a]bsent a statutory

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the question before us, calling Merriam-Webster's definition of "preschool" that reads "of, relating to, or constituting the period in a child's life that ordinarily precedes attendance at elementary school" one of "the two possible definitions of preschool."

But that discussion of Merriam-Webster is misleading, because the definition of preschool the Department cites is "preschool" *as an adjective*. The use of "preschool" in Section 2802, which we are charged with interpreting, is as a noun. The Merriam-Webster definition of preschool *as a noun* is "a school for children usually younger than those attending elementary school or kindergarten." If we follow Merriam-Webster, as the Department asks us to, preschool is a school, and 3SL wins.

Attachment D2

Excerpt from
Skoglund v. Barbour

B. Wife's and Husband's Positions Fail to Resolve Whether the Transfer to Teegardin Was a Breach of Fiduciary Duties.

¶20 Wife argues that the transfer to Teegardin was gratuitous — a gift that was not a business decision, as the superior court found, and thus by its nature, waste that violated his fiduciary duties. Husband argues that he did not act in bad faith to defraud the marital community, as A.R.S. § 44-1004 prohibits. Husband argues that even though the superior court did not reference that statute, *Gerow* and *Mezey* both applied it, making it the standard for resolution of Wife's claim that he improperly disposed of the shares of VIP he transferred to Teegardin. Husband claims that because the superior court did not find that he had the "actual intent to hinder, delay, or defraud," *see* A.R.S. § 44-1004(A)(1), his transfer to Teegardin could not have violated his fiduciary duties. We reject both parties' positions.

1. Wife's Position: The "Gift" Fallacy

¶21 Wife's position that unconsented substantial transfers of community assets are gifts that automatically violate Husband's marital fiduciary duties fails for three reasons.

¶22 *First*, in Wife's authorities, the transfers benefited one spouse to the detriment of the other. *Mezey*, 204 Ariz. at 607, 609 ¶¶ 32, 41 (husband gave his mistress cash and gifts bought with community funds); *Gerow,* 192 Ariz. at 18 ¶ 40 (husband took goodwill from a community business and opened a competing business in a relative's name without compensating the community); *Roselli v. Rio Communities Serv. Station, Inc.,* 787 P.2d 428, 433 (N.M. 1990) (in considering whether a spouse's transfer of community property to himself violated the fiduciary duty, the court should consider "intervening equities"); *Wright v. Wright,* 280 S.W.3d 901, 909 (Tex. App. 2009) (court reviewed considerable evidence that husband transferred community assets in trying to deprive wife of their use and enjoyment); 15B Am. Jur. 2d *Cmty. Prop.* § 64 (2023) (holding spouses owe a fiduciary duty they can breach by "improper" dissipation of community property). Even if the transfer to Teegardin was imprudent, the court did not find it was for Husband's benefit, nor does our review of the record suggest that it was. Nor does the record support a finding that the transfer was detrimental to Wife.

¶23 *Second*, Wife's argument overemphasizes the gift concept until it obscures the question of whether a transfer is a violation of fiduciary duties. Her brief heavily emphasizes the assertedly gratuitous nature of the

transfer of shares to Teegardin, treating it as necessarily answering the question as to whether the transfer harmed Wife. Wife's theory fails in part because it cannot account for transfers of shares in comparable cases that benefit the business and in turn enrich the community. In other words, if an unconsented gift of shares to Teegardin resulted in Teegardin remaining with VIP and growing the business to new heights that benefitted both Husband and Wife, there would be no fiduciary breach. Wife's authorities suggest injury to her is necessary to constitute a fiduciary breach. In short, labeling a transfer a "gift" does not make the transfer injurious to Wife.

¶24 *Third,* Wife's answer to this logic also fails. She argues the superior court found as a factual matter that the transfer to Teegardin was a gift and that Husband failed to object to that finding. So, Wife reasons, Husband is stuck with the legal consequences Wife suggests flow from the designation of the transfer as a "gift." The finding upon which Wife's argument rests is that "[t]he gifting of shares to Keith in 2014 did not represent a 'business judgment' related to VIP's management." Yet that finding does not support the outcome Wife seeks, because the court made contrary findings that demonstrate the business purpose of the transfer. The court overrode Wife's evidentiary objections and found that Husband and Teegardin drafted a "business plan" under which Teegardin would acquire ownership of shares in VIP. The court likewise credited Husband's testimony that Teegardin's contributions were a but-for cause of VIP surviving the subprime mortgage crisis of 2007, making Teegardin a but-for cause of the $88 million value of the business. The court also found that Wife conditionally consented to the 31% transfer to Teegardin in 2014, and that she asked for other changes to VIP's management documents — but not to Teegardin's 31% ownership share — over the next four years. These factual findings are consistent with Wife's insistence that she never legally consented to the transfer, but they cannot be reconciled with the assertion that giving Teegardin 31% was "not a business judgment related to VIP's management."

¶25 The court's thorough findings of fact demonstrate Husband granted shares to Teegardin for business purposes long recognized by Husband and Teegardin (and implicitly by Wife as well). To the extent the court simultaneously found the transaction had no business purpose whatsoever, it is an abuse of discretion to which we cannot defer.

¶26 For all of these reasons, we reject Wife's position that labeling the transaction as a gift that is not a business decision requires viewing it as a breach of fiduciary duties. And to the extent the superior court made a factual finding that the transfer was a gift that was not a business decision,

we reverse any such finding as an abuse of discretion given the contrary findings that render it insupportable. The right question, as we explain further below in Paragraphs 31–35, is whether the transfer, considered as a business transaction, violated Husband's fiduciary duties to Wife.

2. Husband's Position: The "Good Faith" Fallacy

¶27 Husband contends he did not violate his fiduciary duties to Wife because the transfer to Teegardin did not violate A.R.S. § 44-1004(A). This argument fails because it misreads and asks us to overextend *Gerow* and *Mezey*.

¶28 *Gerow* clearly separates its analysis of fraudulent conveyance and breach of fiduciary duty. There, a husband transferred goodwill and other intangible assets of a business that was community property without notice to his wife before a divorce. 192 Ariz. at 15 ¶ 26. The superior court separately found a fraudulent conveyance and a breach of fiduciary duties, 192 Ariz. at 15 ¶ 26 and we affirmed those findings, likewise parsing the issues separately. *Id.* at 17 ¶¶ 33–36 (affirming finding of fraudulent conveyance under A.R.S. § 44-1004); *id.* at 18 ¶¶ 37–40 (affirming finding of breach of fiduciary duty).

¶29 In *Mezey*, we affirmed an ex-wife's judgment for conversion against her ex-husband's mistress where the ex-husband concealed transfers of property and monies to the mistress for which he received no consideration, and which were made in furtherance of divorce. 204 Ariz. at 608 ¶ 41. The superior court held those concealed transfers of property were fraudulent in violation of A.R.S. § 44-1004(A), a conclusion we also affirmed. Our decision in *Mezey* repeats that spouses owe each other fiduciary duties in the management of community assets, but it does not explain the relationship of A.R.S. § 44-1004(A) to the spousal duty to act as a fiduciary of the community. While the existence of a fraudulent transfer is sufficient to demonstrate a breach of fiduciary duty, it does not follow (as Husband's briefing suggests) that the absence of a fraudulent transfer affirmatively demonstrates that Husband breached no fiduciary duty to Wife.

¶30 As *Gerow* and *Mezey* correctly suggest, the fact that the superior court did not find that Husband fraudulently transferred the VIP shares to Teegardin does not immunize Husband from a claim that he violated fiduciary duties to Wife through the transfer. We therefore reject Husband's argument that there was a no breach of fiduciary duty because he did not violate A.R.S. § 44-1004.

C. The Criteria for Determining Whether Giving Teegardin a 31% Stake in VIP Violated Fiduciary Duties

¶31 Upon remand, the superior court must determine whether the transfer to Teegardin violated Husband's fiduciary duties. We have already explained what does *not* conclusively resolve the question: Wife's non-consent, labeling the transaction as a gift, and pointing out the transfer was not held fraudulent. So on to what does answer the question. First, the superior court should consider the criteria for fiduciary breach within community property businesses suggested by *Gerow* and *Mezey*. Second, given Husband's operational control over VIP, the superior court should also consider whether Husband breached fiduciary duties in the way a managing member of a corporation may breach duties to a non-managing member. We explain those distinct inquiries next.

1. Whether the Transfer of Shares to Teegardin Bore the Indicia of Fiduciary Breaches in *Gerow* and *Mezey*

¶32 While *Gerow* and *Mezey* do not provide the only instances of fiduciary breaches in the context of businesses that are community property, and their facts do not furnish clean rules, they are our leading cases and are instructive. Thus, the superior court should consider whether Husband's conduct bore the indicia of fiduciary breaches that were present in *Gerow* and *Mezey*. These include whether: (1) Wife lacked notice of the transfer to Teegardin; (2) Wife took affirmative steps to block the transfer to Teegardin, or instead acquiesced in it; (3) Husband's transfer to Teegardin was "divorce planning"; (4) Husband was economically benefited by the transfer; and (5) the amount of the transfer was so great as to be unfair in light of Teegardin's past, then-current, and anticipated contributions. *See Mezey*, 204 Ariz. 599; *Gerow*, 192 Ariz. 9. Additionally, the court should consider whether through the transfer to Teegardin, Husband retained a benefit to the detriment of Wife, which is impermissible. *See Zork Hardware Co. v. Gottleib,* 170 Ariz. 5, 6 (App. 1991) (one spouse may not convert a separate debt into a community obligation). Taking these factors as a whole, the superior court should determine whether they indicate Husband has breached fiduciary duties to Wife.

2. Whether the Transfer of Shares to Teegardin Breached Husband's Fiduciary Duties of Care and Loyalty

¶33 But the inquiry does not end with the above. Wife is not only Husband's spouse, but also his business partner. Thus, while the above factors sound in Arizona's law of community property, they are not the

only way to show Husband breached fiduciary duties to Wife. Given Wife's status as half-owner of VIP through the marital community, Wife can also establish a breach of fiduciary duties by showing Husband's decision to provide Teegardin a 31% stake in VIP in 2014 failed to comply with his duties of care and loyalty as a manager of VIP. *Shoen v. Shoen*, 167 Ariz. 58, 65 (App. 1990) ("[A] board member's obligation to the corporation and its shareholders involves a duty of care and a duty of loyalty. The duty of care refers to the responsibility to exercise the care that a reasonably prudent person in a similar position would exercise under similar circumstances."). If Husband did not breach duties of care and loyalty as a corporate manager in making the transfer to Teegardin, then the transfer was not just a business decision, as the court's other findings indicate, but was a defensible business decision. In that case, it cannot be shoehorned into the rule we approved in *Mezey*, that "absent intervening equities, a gift of substantial community property to a third person without the other spouse's consent may be revoked and set aside for the benefit of the aggrieved spouse." 204 Ariz. at 608 ¶ 38.

¶34 On remand, the inquiry into whether the Teegardin transfer violated duties of care and loyalty includes, but is not limited to, considering "the value the community received as a result of the 2014 transfer," which the superior court did. Because the court's findings of fact demonstrate that the transfer to Teegardin was a business decision, the court must determine its prudence and loyalty in the total context of that business decision. That context necessarily includes Teegardin's then-past, current, and anticipated contributions, any past plans to make Teegardin a part owner by VIP's manager (Husband) that led Teegardin to create value for the community business, and any later conduct of Wife that reflected agreement (as shareholder or otherwise) that Teegardin's shares were properly granted so long as she took half of what remained.

¶35 We therefore reverse the order that Wife is entitled to an equalization payment worth 48.835% of VIP's value, and the order awarding Wife 48.835% interest in two other entities, Barbour Teegardin, LLC, and Inventive Technologies, LLC. On remand, the court must determine whether Husband breached a fiduciary duty in light of the foregoing standards. If not, the court must divide the remaining interest in VIP equitably among Husband and Wife.

II. Husband's Admissions Constitute a Prima Facie Case of Waste.

¶36 Courts may consider a spouse's excessive or abnormal expenditures of community assets, *i.e.*, waste, when apportioning

Attachment E1

Excerpt from
State v. Sidor
(pages 7-16)

and the officer's noncompliance with DEA requirements for using the database did not require suppression.

¶21 A jury convicted Sidor of transportation of narcotic drugs for sale and transportation of dangerous drugs for sale (methamphetamine) and. Given his prior criminal history, the superior court sentenced Sidor as a category 2 repetitive offender to concurrent prison terms, the longest of which was for 10 years' imprisonment. We have jurisdiction over Sidor's appeal under Article VI, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

DISCUSSION

¶22 Sidor argues that the drug evidence should have been suppressed because: (1) the officer unlawfully detained him beyond the time required to issue the warning; (2) the officer's use of DEASIL was unlawful; and (3) Turbo's alert did not supply probable cause to search the vehicle.

¶23 We review the superior court's factual findings on the motion to suppress for an abuse of discretion, *State v. Jean*, 243 Ariz. 331, 334 ¶ 9 (2018), and view the facts of the suppression hearing in the light most favorable to sustaining the superior court's ruling. *Id.* at 333 ¶ 2. We review whether reasonable suspicion exists *de novo*, because it is a mixed question of fact and law. *State v. Majalca*, 251 Ariz. 325, 328 ¶ 11 (2021).

I. The Officer Only Had Probable Cause to Detain Sidor After Citing Him for His Moving Violation if the DEASIL Data Were Not Obtained in Violation of the Federal and Arizona Constitutions.

A. The Officer Reasonably Detained Sidor from the Time of the Moving Violation Through Issuing the Warning and Returning the Nissan's Insurance and Registration to Sidor.

¶24 Sidor concedes the moving violation justified the traffic stop. Warrantless traffic stops are permitted if the officer has reasonable suspicion that the driver committed a traffic violation. *State v. Evans*, 237 Ariz. 231, 233 ¶ 1 (2015).

¶25 Instead, Sidor questions the length of his detention as a result of the traffic stop. Police may "inquir[e] into matters unrelated to the justification for the traffic stop . . . so long as those inquiries do not measurably extend the duration of the stop." *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Rodriguez v. United States*, 575 U.S. 348, 355 (2015) ("An

officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.")

¶26 About 11 minutes elapsed from the time the officer pulled Sidor over to when he issued the warning. The officer testified that such amount of time was typical for conducting a records check and issuing a warning. The record supports the superior court's ruling that this initial detention of Sidor was not unreasonably prolonged by the officer's inquiries into matters unrelated to the traffic violation. No evidence was presented that the officer completed, or reasonably could have completed, "tasks tied to the traffic infraction" sooner had he not made those unrelated inquiries. *Rodriguez*, 575 U.S. at 354. The detention through the issuance of the warning was thus proper.

B. The DEASIL Data Showing the Distinctive Pattern in the Car's Travels and the Fact That Sidor Was Driving a Borrowed Car Whose Owner He Did Not Know Created Reasonable Suspicion for Sidor's Continued Detention.

¶27 The officer was only permitted to detain Sidor involuntarily until Turbo sniffed the Nissan if he had a reasonable suspicion of criminal activity. *See State v. Sweeney*, 224 Ariz. 107, 112, ¶ 17 (App. 2010). "By definition, reasonable suspicion is something short of probable cause." *Majalca*, 251 Ariz. at 330 ¶ 20 (2021). "Although 'reasonable suspicion' must be more than an inchoate 'hunch,' the Fourth Amendment only requires that police articulate some minimal, objective justification for an investigatory detention." *State v. Teagle*, 217 Ariz. 17, 23 ¶ 25 (App. 2007). Reasonable suspicion exists where "'the totality of the circumstances—the whole picture' of what occurred at the scene" provides a law enforcement officer with "'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Evans*, 237 Ariz. at 234 ¶ 8 (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)). The determination of reasonable suspicion "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990).

¶28 We agree with our dissenting colleague that Sidor's behavior up through the issuance of the citation did not justify continuing to detain him. The superior court properly rejected the officer's observations that Sidor was suspicious because his hands were at 10 and 2 on the steering wheel, observing that the judge himself was taught to drive that way in

school. Looking "straight ahead" as one passes a law enforcement vehicle is likewise not a reliable indicator of criminal activity. *See State v. Maldonado*, 164 Ariz. 471, 473–74 (App. 1990) (citing cases in which little weight was given to evidence that a driver was "sitting erectly" or "rigidly" and did not look at a patrol car). The court was properly cautious about giving too much weight to evidence of Sidor's nervousness, as the video evidence does not show the "overly nervous" behavior to which the officer testified. *See State v. Magner*, 191 Ariz. 392, 397–98 ¶¶ 14–15 (App. 1998) (cautioning courts to "be wary of granting much weight to a law enforcement officer's subjective observation that a defendant was nervous" absent "'dramatic' indications of nervousness" that "both objectify and quantify the nervousness exhibited") (overruled in part on another ground, *State v. O'Meara*, 198 Ariz. 294 (2000)). Finally, the officer acknowledged at the evidentiary hearing that the records check disclosed nothing amiss about Sidor or the Nissan and that Sidor's answers to his questions revealed no inconsistencies with other information provided by Sidor or otherwise known to the officer.

¶29 Our analysis of the superior court's conclusion that there was reasonable suspicion for the officer to detain Sidor for the dog sniff thus rests on the officer's use of the DEASIL data, and the fact that Sidor was driving a borrowed Nissan across the country, a Nissan Sidor borrowed from someone other than the owner. The DEASIL data showed the Nissan made two trips through Kingman (first westbound and then eastbound) two months earlier. Then the next month, the Nissan again was traveling eastbound through Kingman. Both trips may have involved the Nissan going to and coming from California. Then a few days before Sidor's arrest, the Nissan traveled westbound through Kansas, which was consistent with Sidor's explanation of his trip to and from California. At bottom, Sidor's trip was the third time in three months, at precise one-month intervals, at which the Nissan went through Kingman at the end of a month. By Sidor's own explanation, he had been to and from California on that third trip. Even on a de novo review, that evidence supports the superior court's finding the officer reasonably could conclude Sidor might have been engaged in drug trafficking.

¶30 The suggestive force of these facts is where we differ with the dissent. We agree with the dissent that "[r]easonable suspicion cannot rest solely on 'circumstances or factors that do not reliably distinguish between suspect and innocent behaviors . . . because they may cast too wide a net and subject all travelers to 'virtually random seizures.'" *Sweeney*, 224 Ariz. at ¶ 22. The DEASIL data strongly suggest that Sidor's travel to Los Angeles formed a pattern with trips others took in the same Minnesota-

plated car from the upper Midwest through western Arizona, to southern California and back on each of October 30, November 30, and December 31. We agree with the superior court's choice to credit law enforcement's inference that this highly distinctive pattern of travel is distinguishable from "innocent behaviors." We thus disagree that crediting that inference subjects the public to "virtually random seizures." *See id.*

¶31 One of our recent memorandum decisions illustrates the difference between facts that give rise to reasonable suspicion in a traffic stop, as here, and those that do not. *State v. Kochendarfer*, No. 1 CA-CR 20-0364, 2021 WL 3674160 (Ariz. App. Aug. 19, 2021) (mem. decision). In *Kochendarfer*, another driver of a car with out-of-state plates passing through western Arizona was pulled over on Interstate 40 for following another large vehicle too closely. *Id.* at *1 ¶ 2. While those facts match Sidor's case perfectly, the rest do not. That driver was driving repetitively between California and Texas because he was "in the process of moving from California to Texas and had made multiple trips in the last several months," a common and mundane activity. *Id.* at *1 ¶ 3.

¶32 There is also no indication in *Kochendarfer* that the driver borrowed the car, or didn't know its owner, as was true here, heightening suspicion. *See United States v. Pettit*, 785 F.3d 1374, 1382 (10th Cir. 2015) ("In the trooper's professional experience, and in our case law, driving a vehicle registered to an absent third party can indicate drug trafficking."). Sidor, by contrast, drove a borrowed car cross-country without knowing its owner. *See id.* Despite claiming he had just bought a bulldog puppy in southern California, Sidor when pulled over was reprising a quick turnaround trip that others drove before him in the same car between Minnesota and southern California. *See United States v. Eymann*, 962 F.3d 273, 282 (7th Cir. 2020) (affirming denial of motion to suppress, holding pattern of quick turn-around flights between California and Pennsylvania supported inference that criminal activity was afoot: "[s]uch quick-turn flights, although not necessarily illegal, may contribute to reasonable suspicion of criminal conduct."). Moreover, those three trips fell in a highly regular pattern implying a common purpose: on October 30, November 30, and December 31. All of this supports crediting law enforcement's suspicion that criminal activity was afoot. *See id.*

¶33 Given the facts and case law, the superior court did not err by denying Sidor's motion to suppress. We agree with the superior court that the record, in particular the DEASIL data and the fact that Sidor borrowed the car, created reasonable suspicion to detain Sidor for the dog sniff. The question then becomes whether the State was entitled to rely on the DEASIL

data as a basis to search Sidor's vehicle, or whether any reliance on it is improper, as Sidor argues.

II. The State Had the Right to Search the Car Sidor Was Driving Based in Part on the DEASIL Data, Because They Primarily Concerned the Movements of Others, in Which He Had No Reasonable Expectation of Privacy.

¶34 Sidor argues the officer's use of DEASIL requires suppression because: (1) the database infringed privacy interests protected by the Fourth Amendment; (2) even if use of the database did not constitute a "full search" requiring a warrant supported by probable cause, it was at minimum a "limited search" requiring reasonable suspicion; and (3) the officer lacked reasonable suspicion before using DEASIL and falsely attested to having it in violation of DEA requirements.

¶35 The State responds that the officer's use of DEASIL did not infringe Sidor's Fourth Amendment rights because: (1) he had no reasonable expectation of privacy in the Nissan's license plate or its movements on public roads; (2) the information captured by the automated license plate readers (ALPRs[3]) that fed into DEASIL was minimal and did not constitute a trespass; and (3) the officer's alleged misuse of the database did not require suppression. As explained next, we agree with the State's position, given the particular facts of this case.

A. The Limited Use of DEASIL Data Here Did Not Infringe on Sidor's Reasonable Expectation of Privacy.

¶36 We reject Sidor's argument that the State's use of DEASIL information here violated the Fourth Amendment because it was like the cell site location information (CSLI) in *Carpenter v. United States*, 585 U.S. 296 (2018). *Carpenter* involved the "tireless and absolute surveillance" a cell phone's location enables whenever it makes or receives a call. *Id.* at 305,

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[3] ALPRs are "high-speed cameras that photograph each license plate that passes by the devices," which "can image about 2,000 license plates per minute," at any time of the day, and which "can be placed anywhere from police vehicles to stationary objects like poles, traffic lights, and overpasses." Samuel D. Hodge, Jr., *Big Brother Is Watching: Law Enforcement's Use of Digital Technology in the Twenty-First Century*, 89 Univ. Cin. L. Rev. 30, 38 (2020). Images captured by ALPRs "are transmitted and analyzed by a computer that identifies the owner of the vehicle, affixes a time and location stamp, and uploads the images to a central server." *Id.*

312. The Supreme Court held in *Carpenter* that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id.* at 310. The Court found the use of CSLI to be a search under the Fourth Amendment requiring a warrant because of the "all-encompassing record of the holder's whereabouts" it afforded. *Id.* at 311.

¶37 Here, the DEASIL database information concerning Sidor was entirely the opposite. It consisted of one picture of the Nissan's license plate, taken as Sidor traveled west through Kansas toward California the day before he was stopped near Kingman on his return. *Carpenter* made clear that one has "a reasonable expectation of privacy in the whole of their physical movements." 585 U.S. at 310 (citing *United States v. Jones,* 565 U.S. 400, 430 (2012) (Alito, J., concurring)); *id.* at 415 (Sotomayor, J., concurring). But the officer only accessed a single picture of the Nissan's license plate while Sidor drove it, which is hardly "the whole of [Sidor's] physical movements." *See id.* We thus agree with the Massachusetts Supreme Judicial Court's statement in *Commonwealth v. McCarthy* that while the right to privacy from comprehensive surveillance "could be implicated by the widespread use of ALPRs, that interest is not invaded by the limited extent and use of ALPR data in this case." 142 N.E.3d 1090, 1095, 1106 (Mass. 2020) ("While we cannot say precisely how detailed a picture of the defendant's movements must be revealed to invoke constitutional protections, it is not that produced by four cameras at fixed locations on the ends of two bridges.").

¶38 Sidor lacked a reasonable expectation of privacy in the DEASIL data that justified detaining him for Turbo's sniff of the Nissan because those data principally concerned other drivers of the Nissan on other trips. DEASIL revealed two trips the Nissan had taken through Arizona on October 30 and November 30, 2020, seemingly consistent with Sidor's own. But Sidor did not own the Nissan, and did not participate in those trips. He thus lacked a reasonable expectation of privacy in those other travelers' locational data. *See, e.g., United States v. Beaudion*, 979 F.3d 1092, 1100 (5th Cir. 2020) (holding that defendant lacked a "reasonable expectation of privacy in a [CSLI] record that reveals someone else's location"). Arizona law likewise makes clear that Sidor cannot assert a right to privacy in the Nissan's travel for its absent owners or prior drivers. *See State v. Juarez*, 203 Ariz. 441, 444, 447 ¶¶ 13, 24 (App. 2002) (interpreting Article 2, Section 8 of the Arizona Constitution as "imply[ing] that a person must show that *his* or *her* personal privacy rights were infringed before attacking the legality of a search or seizure" and holding that neither that provision nor Arizona case law confers "automatic standing to challenge a

search and seizure in which someone else's rights may have been violated.").

¶39 Sidor makes an excellent point – the use of ALPR data may soon be so widespread as to risk offering government the very comprehensive surveillance decried in *Carpenter* and against which the Fourth Amendment stands. *See, e.g., United States v. Tuggle*, 4 F.4th 505, 509 (7th Cir. 2021) ("[W]e are steadily approaching a future with a constellation of ubiquitous public and private cameras accessible to the government that catalog the movement and activities of all Americans."); *United States v. Yang*, 958 F.3d 851, 863, 864 (9th Cir. 2020) (Bea, J., concurring) (discussing ALPR database containing over 10 billion images and stating, "[i]f the technology evolves in the way amici hypothesize, then perhaps in the future a warrant may be required for the government to access the LEARN database [of ALPR data], but this should only be the case if the database evolves to provide comparable location information to the records in *Carpenter*.").

¶40 But his point founders because this record contains little information about DEASIL's scope. No evidence was offered, for example, of how many ALPRs feed into DEASIL or where they are located. This case did not suggest that ALPRs are rife along the interstate highway system, because Sidor's December 2020 cross-country drive of more than 24 hours triggered the generation of only one ALPR image contained in the record. That ALPRs can generate privacy concerns akin to those in *Carpenter* awaits a bleaker future and a case with a more developed record.

B. While ALPRs Implicate Privacy Concerns, on the Record Presented, Their Use Was Not a Limited Search Under the Fourth Amendment.

¶41 Sidor's objections that the use of ALPRs was a limited search under the Fourth Amendment and that the officer's false certification of a reasonable articulable suspicion of drug trafficking before pulling him over fail because the mere use of ALPRs is not yet a search in American law – though in a more developed record, or a future more rife with cameras, it might well be a search.

¶42 While we do not know DEASIL's reach, its use affects privacy interests. The DEA – the proprietor of the database – makes this clear by requiring that an officer have "[r]easonable [a]rticulable [s]uspicion" of specific criminal activity in order to run a license plate query in the database. The phrase "reasonable articulable suspicion" comes directly

from interpretations of the Fourth Amendment. *See United States v. Place*, 462 U.S. 696, 702–03 (1983). The phrase has come to signify the objective, particularized showing required of police before they may conduct a limited invasion of a person's Fourth Amendment rights. *See Terry*, 392 U.S. at 20–22; *see also State v. Superior Court (Blake)*, 149 Ariz. 269, 273–74 (1986).

¶43 State laws regulating the use of ALPRs illustrate a broadly-held belief that information captured by ALPRs and compiled in databases like DEASIL impact privacy interests. *See* Nat'l Conf. State Legislatures, State Statutes Related to Privacy and Data Retention, Automated License Plate Readers: State Statutes (Feb. 3, 2022), https://www.ncsl.org/technology-and-communication/automated-license-plate-readers-state-statutes (last visited Aug. 16, 2023) (summarizing laws in 17 states). Such laws limit ALPR use to specified purposes, prevent public disclosure of ALPR information, and impose destruction and reporting requirements. *See, e.g.*, Me. Rev. Stat. tit. 29-a, § 2117-A(3)(C), (4), (5) (2019) (allowing the use of ALPRs by law enforcement in crime prevention only if the officer has "specific and articulable facts of a concern for safety, wrongdoing or a criminal investigation or pursuant to a civil order or records from the National Crime Information Center database or an official published law enforcement bulletin" and requiring that such data be kept confidential and destroyed within 21 days under most circumstances); Minn. Stat. § 13.824(2)(d), (3), (5), (6) (2021) (prohibiting the use of ALPRs "to monitor or track an individual who is the subject of an active criminal investigation unless authorized by a warrant, issued upon probable cause, or exigent circumstances justify the use without obtaining a warrant" and imposing nondisclosure, destruction, and public reporting requirements); Neb. Rev. Stat. §§ 60-3203(2), 60-3204 (2018) (limiting law enforcement's use of ALPRs to identifying "[o]utstanding parking or traffic violations," "[a]n unregistered or uninsured vehicle," "[a] vehicle in violation of the vehicle equipment requirements," "[a] vehicle in violation of any other registration requirement," "[a] vehicle registered to an individual for whom there is an outstanding warrant," "[a] vehicle associated with a missing person," "[a] vehicle that has been reported as stolen," or "[a] vehicle that is relevant and material to an ongoing criminal investigation"; permitting manual queries only in cases of "an ongoing criminal or missing persons investigation"; and requiring officers to "document the reason" for any such manual query); West's Utah Code Ann. §§ 41-6a-2003(2)(a), 41-6a-2004 (West 2023) (permitting law enforcement use of ALPRs only "as part of an active criminal investigation," "to apprehend an individual with an outstanding warrant," "to locate a missing or endangered person," or "to locate a stolen vehicle," and imposing destruction and nondisclosure requirements).

¶44 While often recognizing the privacy issues ALPRs pose, courts considering the question have thus far uniformly held that the uses of ALPRs before them were not Fourth Amendment searches requiring warrants or probable cause. *See McCarthy*, 142 N.E.3d 1090, 1106 (explaining it was not a search when defendant's vehicle was tracked by ALPRs on two Cape Cod bridges after police had reason to believe defendant was trafficking drugs in the area); *United States v. Rubin*, 556 F. Supp. 3d 1123, 1127-30 (N.D. Cal. 2021) (explaining ALPR database query run on license plate associated with robbery); *United States v. Graham*, Crim. No. 21-645 (WJM), 2022 WL 4132488 (D. N.J. Sept. 12, 2022) (same); *United States v. Porter*, No. 21-cr-00087, 2022 WL 124563 (N.D. Ill. Jan. 13, 2022) (same); *United States v. Brown*, No. 19 CR 949, 2021 WL 4963602 (N.D. Ill. Oct. 26, 2021) (same); *United States v. Bowers*, No. 2:18-CR-00292-DWA, 2021 WL 4775977, *1 (W.D. Pa. Oct. 11, 2021) (explaining that the ALPR database query run on defendant's license plate was "two days after the date of the offense"); *United States v. Toombs*, 671 F. Supp. 3d 1329, 1335 (N.D. Ala. 2023) (affirming a magistrate judge's recommendation to deny a suppression motion challenging the use of DEASIL, where there was reasonable suspicion to detain the defendant for a dog sniff regardless of the DEASIL search); *see also Yang*, 958 F.3d at 862–64 (Bea, J., concurring) (disagreeing with majority's decision that defendant lacked standing but finding no "search" where defendant's license was entered into an ALPR database after the vehicle was linked to a string of thefts). This reinforces our conclusion that Sidor was not subjected to an unconstitutional search by the officer on the particular facts of this case, where the DEASIL query only resulted in a single snapshot of his car travel taken the day before, and where the relevant pattern in the DEASIL data consisted almost entirely of the movements of other persons.

¶45 No one should misread this case, or those others, as establishing a rule that using DEASIL cannot be a Fourth Amendment search. For one thing, as DEASIL becomes more comprehensive, its reach backwards in time to map the activities of defendants will continue to improve, making it ever more CSLI-like. *See, e.g., Yang*, 958 F.3d at 864 (Bea, J., concurring) (suggesting that when ALPRs become CSLI-like in their ability to track movements, the logic of *Carpenter* would apply to their use); *Tuggle*, 4 F.4th at 509 (warning of rise of ubiquitous camera surveillance and likely evolution of legal landscape in reaction to it). For another, as the parentheticals in Paragraph 44 explain, all but one of the cases finding the ALPR data not to be a search involved ALPR data obtained *after* police had reason to believe that a particular vehicle was involved in a specific crime. Those courts all reviewed uses of ALPR where the reasonable articulable suspicion to use the ALPR was a given. Where, as here, an officer uses the

DEASIL database *to generate the facts necessary to constitute reasonable suspicion*, the database may elicit information providing a far more elaborate picture of travel in which the car-owner had a reasonable expectation of privacy, justifying suppression. Whether fortuitously or otherwise, this was simply not that case.

C. The Record of This Case Does Not Allow Us To Conclude That the Officer's Certification to Obtain the DEASIL Data Compelled the Suppression of the Fruits of the Traffic Stop.

¶46 We are troubled by the use of DEASIL based on an automatic certification of articulable reasonable suspicion in all cases. Yet while Sidor argues that the officer violated DEA's policies, those policies or guidelines are not part of this record, so we see no legal error in the superior court finding no violation. The United States Supreme Court has applied the exclusionary rule where "the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006). Yet the briefing before us identifies no statutory violation. For these reasons, and those stated in Paragraphs 36 to 45, Sidor has not shown that the superior court misapplied the law in declining to exclude the ALPR data, consisting of one photograph of the Nissan with Sidor driving it, and other data concerning other drivers.

III. Turbo's Alert Was a Reliable Basis For Searching the Nissan.

¶47 We reject Sidor's claim that Turbo's alert was not sufficiently reliable to establish probable cause for searching the Nissan. As Sidor recognizes, "a well-trained dog's alert establishes a fair probability—all that is required for probable cause—that either drugs or evidence of a drug crime . . . will be found." *Florida v. Harris*, 568 U.S. 237, 246 n.2 (2013); *see also Teagle*, 217 Ariz. at 27 ¶ 36 n.7. Courts should apply a "flexible, all-things-considered approach" to determining a dog's reliability. *Harris*, 568 U.S. at 244.

¶48 The superior court did not abuse its discretion by finding Turbo's alert reliable based on his certification and training logs. Turbo was certified, about 12 weeks before he was deployed to sniff Sidor's vehicle, to detect heroin, cocaine, and methamphetamine. While certification required an 80 percent pass rate, Turbo's training logs between the date he was certified and when he sniffed the Nissan show 100 percent accuracy in alerting when those drugs were present and not alerting when they were

Attachment E2

Kirsten v. ADOT

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

AARON WILLIAM KIRSTEN, *Appellant*,

v.

ARIZONA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DIVISION, *Appellee*.

No. 1 CA-CV 24-0092

FILED 10-01-2024

Appeal from the Superior Court in Coconino County
No. S0300CV202300283
ADOT No. AP34496601
The Honorable Stacy Lynn Krueger, Judge

VACATED AND REMANDED

COUNSEL

John Trebon P.C., Flagstaff
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Erik T. Cooper
Counsel for Appellee Arizona Department of Transportation

OPINION

Judge Andrew M. Jacobs delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Judge Samuel A. Thumma joined.

J A C O B S, Judge:

¶1 Aaron Kirsten ("Kirsten") appeals an Arizona Department of Transportation ("ADOT") order administratively suspending his driver's license for ninety days because his blood contained metabolites of Tetrahydrocannabinol ("THC") after a traffic stop. Through Proposition 207, the people of Arizona enacted A.R.S. § 36-2852(A), which legalized the use of marijuana, subject to exceptions not relevant here. Absent impairment while driving, A.R.S. § 36-2852(A)(1) bars the State from penalizing the legal use of marijuana by limiting Kirsten's driving privileges. Because the State did not show Kirsten was impaired to any degree, and because the order administratively suspending his license is premised on the lack of any requirement of impairment, we vacate the superior court's order affirming the ADOT order and direct the entry of an order voiding the suspension of Kirsten's license.

FACTS AND PROCEDURAL HISTORY

¶2 In the early morning hours of October 28, 2022, a Sedona police officer stopped Kirsten for speeding. During the traffic stop, the officer noticed Kirsten had bloodshot, watery eyes, slurred speech, and was unsteady on his feet. The officer conducted a preliminary breath test. Kirsten blew a blood alcohol content ("BAC") of 0.083, but refused to take a standardized field sobriety test. The officer arrested Kirsten for driving while under the influence pursuant to A.R.S. § 28-1381.

¶3 While in custody, Kirsten voluntarily submitted to blood tests and a deputy with the Yavapai County Sheriff's Office conducted a blood draw. A forensic scientist with the Northern Regional Crime Laboratory of the Arizona Department of Public Safety ("DPS") analyzed Kirsten's blood and found Kirsten's BAC at the time of the blood draw was 0.063, below the concentration of 0.08 that gives rise to the presumption of intoxication in A.R.S. § 28-1381(G)(3). A different DPS forensic scientist analyzed Kirsten's blood for drugs and found Kirsten's blood contained 11 +/- 3 nanograms per milliliter of THC, the active ingredient of cannabis.

¶4 ADOT suspended Kirsten's driver's license for ninety days. Kirsten requested a stay of ADOT's order and an administrative hearing. At the administrative hearing, the officer testified to Kirsten's appearance and behavior during the traffic stop. Further, Kirsten's blood test results and a supporting forensic scientist's affidavit showing presence of cannabinoid metabolites in his blood were admitted into evidence. Kirsten testified he did not consume marijuana within twenty-four hours of the traffic stop. Kirsten's witness, Dr. Dennis Kirsten, a chiropractor and nurse practitioner, testified THC can stay in a person's system for weeks; and the presence of THC in blood does not necessarily indicate impairment or that the person used marijuana within forty-eight hours of the blood draw.

¶5 After considering the evidence and argument, an Administrative Law Judge ("ALJ") affirmed the ninety-day suspension, reasoning that Kirsten was driving under the influence because his blood contained cannabinoid metabolites. The ALJ ruled that the State was not required to show Kirsten was impaired, but was only required by A.R.S. § 28-1385(M)(1) and (M)(3)(b) to show that the arresting officer had reasonable grounds to believe Kirsten was driving while under the influence and that he had metabolites of cannabis in his body. The ALJ concluded that "[w]hether or not Petitioner smoked marijuana within twenty-four hours or if Petitioner thought he was impaired is irrelevant." The ALJ also rejected Kirsten's other challenges to the testing, which are not at issue here, including the accuracy of the evaluation of his blood, and the propriety of the methods used to analyze it.

¶6 Kirsten timely appealed. The superior court affirmed, adopting the ALJ's reasoning that the arresting officer had reasonable grounds to believe Kirsten was under the influence, and that valid and reliable testing showed cannabinoid metabolites in Kirsten's body while driving. The court found that A.R.S. § 36-2852, which outlines allowable possession and use of marijuana and prohibits penalties for the mere fact of its legal use, did not conflict with A.R.S. § 28-1385(M), which allows an administrative driver's license suspension if any cannabis metabolites are in a person's body while they drive. The court found the ALJ did not err by finding "impairment was not at issue." The court concluded that, in A.R.S. § 28-1385, "[t]he legislature has determined that there will be zero tolerance levels for all drugs."

¶7 Kirsten timely appealed to this court. We have jurisdiction pursuant to A.R.S. § 12-913, JRAD 13(a) & (b), and Article 6, Section 9 of the Arizona Constitution. *See Svendsen v. Ariz. Dep't of Transp.*, 234 Ariz. 528, 533 ¶ 13 (App. 2014).

DISCUSSION

¶8 "We review questions of statutory interpretation de novo and construe ballot measures to effect the voters' intent." *State v. Gear*, 239 Ariz. 343, 345 ¶ 11 (2016). "The most reliable indicator of that intent is the language of the statute, and if it is clear and unambiguous, we apply its plain meaning and the inquiry ends." *State v. Jones*, 246 Ariz. 452, 454 ¶ 5 (2019). When statutes conflict, "we adopt a construction that reconciles them whenever possible, giving force and meaning to each." *State v. Jones*, 235 Ariz. 501, 502 ¶ 6 (2014).

Arizona Revised Statutes §§ 36-2851 and -2852 Do Not Permit the State to Suspend Kirsten's License for the Presence of Metabolites of Cannabis in His Blood Without Showing Any Impairment.

¶9 Kirsten argues the presence of THC in his blood alone, without a showing of impairment, is insufficient to administratively suspend his driver's license. Kirsten reasons that, because A.R.S. § 36-2852(B) requires impairment to convict him of driving under the influence, the ALJ erred in applying A.R.S. § 28-1385's administrative license suspension provisions to him. The State responds that (1) A.R.S. § 36-2852 did not blanketly legalize driving after prior marijuana use, thus permitting the administrative suspension of his driver's license because his blood contained metabolites of cannabis, and (2) the record shows Kirsten was impaired, allowing us to affirm on that alternative basis.

¶10 Two different provisions in Proposition 207 explain how to reconcile A.R.S. § 36-2852 with A.R.S. § 28-1385. Those provisions, taken together, do not allow the State to administratively suspend Kirsten's license for impaired driving on the basis of a finding of cannabis metabolites in his body.

¶11 The first of the two provisions is A.R.S. § 36-2852(A). Suspending Kirsten's license under A.R.S. § 28-1385(M)(3)(b) for the presence of cannabis metabolites in his blood without a finding of impairment impermissibly conflicted with A.R.S. § 36-2852(A). It imposed a penalty on Kirsten for reason of his otherwise legal use of marijuana. The voters ruled that out in A.R.S. § 36-2852(A) when they provided that "notwithstanding any other law," which includes A.R.S. § 28-1385(M), the State cannot "abrogat[e] or limit[] any right or privilege conferred or protected by the laws of this state . . . ." A.R.S. § 36-2852(A). The superior court rightly noted that driving in Arizona is privilege. The voters thus included Kirsten's driving privileges in the set of things the State could not

abrogate for prior marijuana use, "[e]xcept as specifically and expressly provided in [A.R.S.] §§ 36-2851 and 36-2853 . . . ." A.R.S. § 36-2852(A).

¶12 The voters specified in A.R.S. § 36-2851(3) that the State may "impos[e] penalties for driving . . . while impaired to even the slightest degree by marijuana." A.R.S. § 36-2851(3). But that was not the case here. Instead, the State claims it can suspend Kirsten's privilege of driving for his prior use of marijuana, as evidenced by metabolites of cannabis in his blood, without any impairment. While that's a correct reading of A.R.S. § 28-1385(M), it is not one that survives the enactment of A.R.S. § 36-2852(A) and A.R.S. § 36-2851(3). *See State v. Gomez*, 212 Ariz. 55, 57 ¶ 11 (2006) (explaining that a court's "primary objective in construing statutes adopted by initiative is to give effect to the intent of the electorate"); *Molera v. Reagan*, 245 Ariz. 291, 294 ¶ 9 (2018) (explaining that "courts must not intrude on the people's power to legislate" and that voter-enacted laws are "even more consequential" than those enacted by the legislature) (citing Ariz. Const. art. 4, pt. 1, § 1(6)(C)).

¶13 The second provision is A.R.S. § 36-2852(B), which provides that "[n]otwithstanding any other law," Kirsten could only be guilty of violating A.R.S. § 28-1381(A)(3), which makes driving with any metabolites of cannabis in one's body illegal, if he was "also impaired to the slightest degree." A.R.S. § 36-2852(B). This reinforces our understanding of the voters' intent, expressed through their enactment of Proposition 207, that unimpaired driving after consuming marijuana cannot be penalized. *Gear*, 239 Ariz. at 345 ¶ 11; *Jones*, 246 Ariz. at 454 ¶ 5. The design of Proposition 207 is unambiguous. The slightest degree of impairment is required before the State may punish prior marijuana use.

¶14 Finally, after litigating this case on the theory that impairment was not required, and having chosen not to argue from the officer's testimony that Kirsten was impaired, the State now asks us to affirm on the basis that Kirsten was actually impaired. The State waived that position by choosing not to pursue it. *BMO Harris Bank N.A. v. Espiau*, 251 Ariz. 588, 594 ¶ 25 (App. 2021) ("If the argument is not raised below so as to allow the trial court such an opportunity, it is waived on appeal.") (quoting *Lighting & Contracting, Inc. v. Premier Grading & Utilities, LLC*, 227 Ariz. 382, 386 ¶ 12 (App. 2011)). Our decision does not portend a significant change in how these proceedings work. The State can argue that persons situated like Kirsten were impaired, using the same proofs ordinarily advanced to show "reasonable grounds to believe the person was driving . . . while under the influence of . . . drugs." A.R.S. § 28-1385(M).

¶15 The plain language of Proposition 207 answers the questions this case poses. *In re Riggins*, 257 Ariz. 1, 4 ¶ 12 (2024) ("If a statute's text is plain and unambiguous, it controls unless it results in an absurdity or a constitutional violation.").

CONCLUSION

¶16 We vacate the decision of the superior court, and direct it to enter an order voiding the suspension of Kirsten's license.

AMY M. WOOD • Clerk of the Court
FILED: AGFV

Attachment E3

Gallery Community Ass'n v. K. Hovnanian at Gallery, LLC

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

GALLERY COMMUNITY ASSOCIATION, *Plaintiff/Appellant*,

v.

K. HOVNANIAN AT GALLERY, LLC, et al., *Defendants/Appellees*.

No. 1 CA-CV 23-0375

FILED 08-06-2024

Appeal from the Superior Court in Maricopa County
No. CV2020-008714
The Honorable Katherine Cooper, Judge

VACATED AND REMANDED

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OPINION

Presiding Judge Andrew M. Jacobs delivered the opinion of the Court, in which Judge Jennifer M. Perkins and Judge David D. Weinzweig joined.

J A C O B S, Judge:

¶1 This is an appeal about whether Arizona law lets homeowners' associations ("HOAs") bring claims for breach of the implied warranty of workmanship and habitability as homeowners' association dwelling actions under A.R.S. § 33-2002(A), where the HOA alleges construction defects in HOA common areas or in property the HOA does not own but must maintain, like homeowners' roofs and exterior walls.

¶2 Here, Gallery Community Association ("the HOA") sued four affiliated entities of the developer K. Hovnanian (collectively, "Hovnanian") that built and sold the eighteen units comprising The Gallery in Scottsdale for construction defects in common areas and areas the HOA must maintain. The HOA owns the common areas, but no one lives within them. And while the HOA must maintain areas within the eighteen units in which its members live, it doesn't own them.

¶3 The superior court granted Hovnanian summary judgment that the HOA cannot bring the common law and statutory claims an owner can for construction defects. The court reasoned that because common law warranties arise from the building of the home and run to homeowners, A.R.S. § 33-2002(A) does not authorize actions by HOAs arising from construction defects, even though similar language in A.R.S. § 33-1242 authorizes parallel actions by condominium associations. We disagree and reverse.

FACTS AND PROCEDURAL HISTORY

A. The HOA's Declaration Grants it Powers and Duties to Maintain the Community.

¶4 The Gallery Community ("Gallery") is a community of townhomes located in Scottsdale, Arizona comprised of four residential buildings containing eighteen units. Individual homeowners purchased the lots. Hovnanian was the developer, designer, general contractor, and seller of Gallery. Hovnanian created the HOA to manage Gallery.

Hovnanian conveyed fee simple title in the common area of Gallery to the HOA by a quitclaim deed.

¶5 The HOA is governed by its Declaration of Covenants, Conditions, Restrictions, and Easements for Gallery (the "Declaration"), which K. Hovnanian created. The Declaration is binding on Hovnanian, the HOA, and all "Owners, Members, and their respective successors in interest." According to the Declaration, Hovnanian created the HOA "for the purpose of the efficient preservation of the values and amenities of the Property . . . ."

¶6 Through the Declaration, Hovnanian gave the HOA control over and the obligation to maintain the common areas in Gallery:

> Without the Owners' approval, the Association shall have the right, in its sole and absolute discretion, as to the Common Area conveyed, leased, or transferred to it or as to any other area placed under its jurisdiction . . . [r]econstruct, repair, replace, or refinish any improvement or portion thereof upon the Common Area or any other area placed under its jurisdiction.

¶7 Hovnanian also vested in the HOA the control of the exteriors of the eighteen dwellings within Gallery. The Declaration authorized the HOA, at its discretion, to "paint the exterior of the Dwelling Units and repair, maintain and replace the exterior walls, stucco, façade, roofs or other surfaces," and "[w]ithout the Owners' approval . . . [r]econstruct, repair, replace or refinish any improvement or portion thereof upon the Common Area or any other area placed under its jurisdiction." Section 8.1.5 of the Declaration also precludes residents from modifying their homes' exteriors without HOA approval:

> No improvement, alteration, landscaping, repair, excavation or other work which in any way alters the exterior appearance of the Property or the improvements located thereon from its natural or improved state existing on the date such Property was first conveyed by Declarant to a homebuyer shall be made without the prior approval of the Architectural Committee [of the HOA], except as otherwise expressly provided in this Declaration, and except in emergency circumstances.

Section 8.1.7 even prohibits residents from "apply[ing] any paint to the exterior of [their home]," delegating that power to the HOA.

¶8 The Declaration grants the HOA a variety of powers to exercise on behalf of the owners of all of the lots in Gallery. Section 6.2 of the Declaration states that the HOA makes annual assessments (fees) against each owned lot:

> To provide for the operation and management of [the HOA] and to provide funds for [the HOA] to pay for the improvement, maintenance and replacement of the Common Area, and to perform [the HOA's] duties and obligations under this Declaration, the Articles and the Bylaws, including, without limitation, the establishment of reasonable reserves for replacements, maintenance and contingencies….

Section 6.10.1 states that "the Board may cause a suit at law to be commenced and maintained in the name of [the HOA] against an Owner to enforce each such Assessment obligation." And Section 6.10.2 allows the HOA to foreclose on defaulting residents.

B. The HOA Sued Hovnanian Over Construction Defects in the Common Area, and Exteriors of Homes the HOA Is Required to Maintain for the Homeowners of Gallery.

¶9 The HOA discovered various alleged construction defects in areas the Declaration obliges the HOA to maintain. Within the common area, the HOA asserted the pool cabana and staircase walls outside many homes' lot lines had construction defects that would result in unanticipated repair costs. The HOA likewise claimed areas within the separately owned exterior walls, roofs, and staircases of Gallery's residence were afflicted with construction defects. According to the HOA's experts, many of these defects included deficient stucco installation on all of Gallery's buildings. The experts stated that entire walls of the affected areas would need to be redone.

¶10 On July 27, 2020, the HOA sued Hovnanian over these alleged defects in four counts: negligence (Count 1); breach of the implied covenant of good faith and fair dealing (Count 2); breach of the implied warranty of workmanship and habitability (Count 3); and breach of contract (Count 4). In Count 3, the HOA repeatedly pled that Hovnanian breached the implied warranty by failures of workmanship. Hovnanian answered that it owed no duty to the HOA, had no privity of contract with the HOA, and that the HOA had no claim for breach of the implied warranty of workmanship and habitability because it was not a homeowner. The HOA later voluntarily dismissed its negligence claim, leaving Counts 2, 3, and 4 at issue.

C. The Superior Court Granted Hovnanian Summary Judgment, Reasoning That the HOA Lacked the Right to Sue for Breach of the Implied Warranty of Workmanship and Habitability.

¶11 On September 30, 2022, Hovnanian (along with several third-party defendant subcontractors involved in building Gallery who are not parties to this appeal), moved for summary judgment against the HOA. Hovnanian argued that the HOA cannot assert claims sounding in the implied warranty of workmanship and habitability because the HOA "is not a homeowner." The HOA responded that builders are more broadly liable for defects in their work under implied warranties arising under Arizona law, and that no privity is required for suits under the implied warranties attaching to their construction.

¶12 On February 13, 2023, the superior court granted Hovnanian's motion for summary judgment on the three counts remaining in the case. As to Count 3, the court agreed with Hovnanian that an HOA could not assert a claim for breach of the implied warranty of workmanship and habitability. The court reasoned that because the HOA is not a homeowner and is suing over damage to common areas, not homes themselves, it "holds no implied warranty." The court likewise ruled for Hovnanian on Counts 2 and 4, reasoning that the HOA could not establish breach of contract or the implied covenant of good faith and fair dealing since the Declaration does not impose contractual construction obligations on Hovnanian.

¶13 The HOA timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1) and Article 6, Section 9 of the Arizona Constitution.

DISCUSSION

¶14 The HOA appeals the superior court's grant of summary judgment as to Count 3, breach of the implied warranty of workmanship and habitability. We review summary judgments *de novo*. *Neptune Swimming Found. v. City of Scottsdale*, 256 Ariz. 497, 503 ¶ 22 (2024). Summary judgment is appropriate if there is no genuine dispute of material fact. Ariz. R. Civ. P. 56(a).

The Superior Court Erred By Entering Judgment for Hovnanian, as Arizona Common Law and Statutory Law Authorize Its Suit for Construction Defects in the Common Areas and Parts of the Residences the Declaration Requires the HOA to Maintain.

¶15 The HOA and amicus curiae Aire on McDowell Community Association argue that Arizona's implied warranty of workmanship and habitability and A.R.S. § 33-2001 and § 33-2002 authorize the HOA to bring its action for construction defects. Hovnanian argues that only a present owner of a home can sue that home's builder under the implied warranty. Hovnanian also argues that A.R.S. § 33-2001 and § 33-2002 do not create or recognize any right by HOAs to file actions for violation of the implied warranty. The HOA and the amicus curiae are right.

A. Arizona Common Law Implies Warranties of Workmanship and Habitability By Builders of Homes to Their Purchasers and Later Owners.

¶16 Arizona has long recognized the implied warranty of workmanship and habitability. *Zambrano v. M & RC II LLC*, 254 Ariz. 53, 59 ¶ 14 (2022). Under the warranty, "the builder-vendor guarantees it built the home in a workmanlike manner and that it is habitable." *Id.* The purpose of the warranty is "to protect innocent purchasers and hold builders accountable for their work." *Id.* (quoting *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 245 (1984)). As such, the warranty is limited to only "latent defects that are undiscoverable by a reasonable pre-purchase inspection." *Id.*

¶17 It is long settled that the implied warranty "protects not only the original buyer but also subsequent purchasers." *Zambrano*, 254 Ariz. at 62 ¶ 25 (citing *Richards*, 139 Ariz. at 245 ("The effects of latent defects will be just as catastrophic on a subsequent owner as on an original buyer and the builder will be just as unable to justify improper or substandard work.")).

¶18 It is thus clear that the owners of homes in Gallery can sue Hovnanian for breaches of the implied warranty, and that later purchasers of those homes can too. We next turn to other provisions of Arizona law that help us answer the question here: whether an HOA may likewise invoke the implied warranty to sue Hovnanian for construction defects in common area structures that are not habitations, and for construction defects in external portions of owned homes the Declaration requires the HOA to maintain. As we explain next, the answer to both questions is yes.

B. The Legislature Determined That HOAs May Sue Builders for Construction Defects, Authorizing the HOA's Suit Against Hovnanian.

¶19 The legislature authorized the HOA's suit here. Arizona Revised Statute § 33-2002(A) provides that, after performing certain conditions no one disputes were performed here, "a homeowners' association may file a homeowners' association dwelling action . . ." *Id.* A "homeowners' association dwelling action" is any action involving a construction defect as defined in section 12-1361 filed by a homeowners' association arising out of or related to the design, construction, condition or sale of the dwelling." A.R.S. § 33-2001(5). Significantly, the legislature defined "dwelling" broadly, to include not only "a newly constructed single family or multifamily unit designed for residential use," but also "property and improvements that are either owned by a homeowners' association or jointly by all of the members of a homeowners' association." A.R.S. § 33-2001(2).

¶20 Section 12-1361(4)(c) integrates the implied warranty into statute by defining "construction defect" as any "material deficiency in the design construction, manufacture, repair, alteration, remodeling or landscaping of a dwelling that is the result of . . . [t]he failure to adhere to generally accepted workmanship standards in the community." A.R.S. § 12-1361(4)(c). Construction defects arising from violations of generally accepted standards of workmanship, as the HOA alleged occurred here, fall within the plain language of A.R.S. § 12-1361(4)(c) and would violate the implied warranty of workmanship and habitability. *See Zambrano*, 254 Ariz. at 61-62 ¶ 25 ("warranting that a home was built using minimum standards of good workmanship" is consistent with purchasers' reasonable expectations). When pressed at argument, even counsel for Hovnanian conceded the overlap in coverage between the statute and the implied warranty.

¶21 Given that the claims in this case all sound in allegedly defective workmanship, there is no need here to parse a theoretical distinction between workmanship and habitability within the implied warranty. *Lofts at Fillmore Condo. Ass'n v. Reliance Com. Constr., Inc.*, 218 Ariz. 574, 576 ¶ 11 n.2 (2008) (assuming without deciding that warranty of workmanship and habitability is a unitary warranty, as opposed to two distinct warranties). The HOA's claims for breach of the implied warranty fall squarely within A.R.S. § 12-1361(4)(c). They thus give rise to a homeowners' association dwelling action as defined in A.R.S. § 33-2001(5) which the HOA may bring under A.R.S. § 33-2002.

¶22 Hovnanian's argument that A.R.S. § 33-2002 and A.R.S. § 33-2001(2) do not authorize the HOA to sue it fails. Hovnanian discounts the plain language of A.R.S. § 33-2002 by pointing out that it "creates requirements that a homeowners' association must follow when filing a 'dwelling action.'" True enough. It requires HOA boards to disclose to their homeowner-members the information material to the suit. A.R.S. § 33-2002(A)(1). It requires a properly noticed meeting of the HOA's owner-members and board. A.R.S. § 33-2002(A)(2). It requires the board to authorize the suit. A.R.S. § 33-2002(A)(3). And it requires notice to the seller "of the alleged construction defects" so they have an opportunity to cure. A.R.S. § 33-2002(A)(4). Finally, if that notice is less than sixty days before the limitations period for suit expires, that period is tolled for sixty days." A.R.S. § 33-2002(B). Hovnanian's argument fails as an initial matter because there is nothing inherent in these procedural hoops that prevents A.R.S. § 33-2002(A)'s plain language – "a homeowners' association may file a homeowners' association dwelling action" – from meaning just what it says. *See Arizona Advoc. Network Found. v. State*, 250 Ariz. 109, 114 ¶ 19 (App. 2020) (explaining that statute's plain language guides its interpretation).

¶23 Hovnanian's interpretation fails for additional reasons. As amicus curiae points out, our courts have taken the language "may file an action," present in A.R.S. § 33-2002(A), to authorize civil actions. *See Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 313 ¶ 17 (2017) (authorizing suits by vulnerable adults); *Hannosh v. Segal*, 235 Ariz. 108, 111 ¶ 7 (App. 2014) (authorizing cause of action for racketeering). So too here. Moreover, A.R.S. § 33-2002(B) refers to "the right of the association to bring a homeowners' association dwelling action." Significantly, the legislature defined a "dwelling" to include the common areas and external portions of homes at issue here. A.R.S. § 33-2001(2).

¶24 One of the guiding principles of statutory interpretation is that we must interpret statutes in their context, as a whole. *Glazer v. State*, 244 Ariz. 612, 614 ¶ 10 (2018). That principle too cuts against Hovnanian's cramped reading of A.R.S. § 33-2001 and § 33-2002. Not only did the legislature state there that HOAs could sue builders in homeowners' association dwelling actions, using an expansive definition of dwelling to encompass common areas, but it created a complex series of checks for those suits and also provided a tolling period for them in limited circumstances. Hovnanian's position amounts to arguing that the legislature created a tolling period for a nonexistent cause of action, and protected sellers by giving them notice and an opportunity to cure in a nonexistent cause of action. Absent a right to bring suits like this one, all of

those provisions in A.R.S. § 33-2001 and § 33-2002 would be gratuitous surplusage. That is not how we read statutes. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019) (directing us "to give meaning, if possible, to every word and provision [of a statute] so that no word or provision is rendered superfluous."). We conclude instead that these statutes authorize the HOA's suit.

¶25 Doing so, we are mindful that the Arizona Supreme Court has held that A.R.S. § 12-1362(A) and (B) do not create a cause of action but instead a procedure for purchaser dwelling actions. *Zambrano*, 254 Ariz. at 62 ¶ 27. We nonetheless reject Hovnanian's argument, grounded in *Zambrano*, that because A.R.S. § 12-1362(A) and (B) do not create a cause of action, A.R.S. § 33-2001 and § 33-2002 likewise do not. The two statutes are importantly non-analogous – our legislature enacted A.R.S. § 12-1362(A) and (B) after case law had recognized the implied warranty for purchasers. As such, they could only constitute rules for the existing cause of action, instead of authorizing the cause of action. But the reverse is true of A.R.S. § 33-2001 and § 33-2002 – when the legislature wrote them, no court had recognized an implied warranty right in HOAs to sue for construction defects. These statutes are either rules for a nonexistent cause of action, or themselves an authorization of one. As explained, we see in A.R.S. § 33-2001 and § 33-2002 a legislative judgment that HOAs may do precisely that.

¶26 Finally, Hovnanian argues that the fact that the legislature authorized suits by condominium associations in A.R.S. § 33-1242(A)(4) using language different from that in A.R.S. § 33-2002(A) demonstrates that the latter statute does not authorize suits. This does not follow. Hovnanian is right that "the association may . . . institute . . . litigation," the wording in A.R.S. § 33-1242(A)(4), is modestly different from "a homeowners' association may file a[n]… action," the language in A.R.S. § 33-2002(A). But the difference is minor and immaterial – their phrasing is similar and parallel, and they both authorize suits by their plain language.

CONCLUSION

¶27 For these reasons, we vacate the superior court's grant of summary judgment and remand for further proceedings. Because we do, we also vacate the superior court's award of attorneys' fees to Gallery. We deny the parties' requests for fees in this court, without prejudice to the parties renewing requests for their appellate fees at the appropriate time in the superior court.

AMY M. WOOD • Clerk of the Court
FILED: AGFV